No. 214

Office - Supreme Court, U.S.
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IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 11,582

UNITED STATES OF AMERICA

vs.

GEORGE MASTROS,

Appellant.

APPEAL FROM THE JUDGMENT AND SENTENCE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA (CRIMINAL ACTION No. 18367).

Appendix for Appellant

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RELEVANT DOCKET ENTRIES.

1955

May 5. True Bill.

Aug. 2. Plea: Not Guilty.

1956

Apr. 9. Jury called and sworn.

Apr. 13. Trial concluded — Count #2 dismissed by the Court.

April 13. Verdict—Guilty on Count #1. Bail continued.

Apr. 16. Defendant's renewal of motion for judgment of acquittal and in alternative a motion for a new trial, filed.

1958

Jan. 9. Opinion, Ganey, J., denying motion for judgment of acquittal and for a new trial, filed.

Feb. 14. Sentence. Imprisonment for a period of thirty days. Execution of the prison sentence is suspended. $500.00 fine. Probation for two years.

Feb. 20. Notice of Appeal filed.

INDICTMENT.

THE GRAND JURY CHARGES:

COUNT I.

That on or about July 31, 1953 in the Eastern District of Pennsylvania, and within the jurisdiction of this court, GEORGE MASTROS, hereinafter referred to as defendant, did make and present, or cause to be made and presented, for payment and approval to the Department of the Army, an agency or department of the United States, a claim against the United States for radio-telephone electronic units on behalf of Espey Manufacturing Company, Inc., in the sum of $1,128,875.81, knowing such claim to be false, fictitious and fraudulent in that the aforesaid defendant made and presented or caused to be made and presented to the Department of the Army, a settlement proposal dated July 31, 1953, on behalf of Espey Manufacturing Company, Inc., which settlement proposal stated $1,128,875.81 was due and owing to the Espey Manufacturing Company, Inc., for radio-telephone electronic units which claim was false since said defendant knew well that the total amount due and owing to the Espey Manufacturing Company, Inc., on said settlement claim was substantially less than the amount claimed; all of which is in violation of Title 18, U. S. C., Section 287.

TESTIMONY.

* * * (N. T. pp. 1 and 2.)

(2) GOVERNMENT'S EVIDENCE.

HOWARD E. MOORE, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

BY MR. FOGWELL:

Q. Mr. Moore, by whom are you employed?
A. By the Army Signal Supply Agency, formerly the Signal Corps.

* * * (N. T. pp. 2 and 3.)

(3) Q. At my request have you brought with you certain documents concerning the Espey Manufacturing Company?
A. I have.
Q. Have you brought the original contract in this case?
A. I have brought a certified photostatic copy of the contracts—of the contract and amendments.

(Photostat of Contract issued by Signal Corps to Espey Manufacturing Company dated 16 June 1950 marked Exhibit G-1.)

BY MR. FOGWELL:

(4) Q. I show you what Mr. Homan has labeled G-1 and ask you what it is.
A. This is the original—or photostatic copy of the original contract dated 16 June 1950 awarded the Espey Manufacturing Company, Inc., by the Signal Corps.
Q. And it is a contract the Government had with what company, if any?

A. Well, the Government awarded the contract to the Espey Manufacturing Company.

Q. What is the amount of the original contract?

A. $2,752,422.75. That is with the discount deducted.

Q. What was to be produced by Espey?

A. 17,000 Control Group AN/GRA-6 and other items related to that piece of equipment.

THE COURT: Give me the amount of the contract again, please, Mr. Moore.

THE WITNESS: $2,752,422.75.

BY MR. FOGWELL:

Q. Now, if you know, was this what is called a supply contract or a development contract?

A. This was a production contract, as we refer to it, for materials.

Q. What was the original date of it again?

(5) A. 16 June 1950.

Q. When were deliveries to be made?

THE COURT: What are these 17,000 units other than by number? Can you tell us what they are, sir?

THE WITNESS: Well, it is some radio equipment of some kind. I cannot tell you exactly what they are. They are a rather complicated piece of equipment.

THE COURT: Are they single units, the 17,000?

THE WITNESS: Yes, there are several items that go to make up the end item.

MR. FOGWELL: Judge Ganey, it is a radio communications item which goes in the top of a tank to transmit and

receive messages from tank to tank in the field. Accordingly, they are separate units.

THE COURT: We will call them 17,000 X's.

MR. FOGWELL: That is all right, sir.

BY MR. FOGWELL:

Q. Were any deliveries made on this contract, if you know?

A. No deliveries of the end item, that is, this equipment, were made. There were some other items totaling approximately 29,000 delivered. These items were not terminated.

Q. Do you know the date the contract was terminated?

A. 19 February 1953.

Q. If you know, how much was provided in the contract (6) for the writing of manuals?

A. Well, literature and tabular lists of parts totaled $3,062.50.

THE COURT: Three thousand ——

THE WITNESS: Sixty-two fifty.

BY MR. FOGWELL:

Q. Now, are you familiar with the Job 381?

A. Is this the contractor's job number?

Q. Yes, if you are familiar with it. Are you?

A. I am not.

(Photostat of copy of letter dated February 25, 1952, to contracting officer, Signal Corps Supply Agency from Espey, marked Exhibit G-2.)

BY MR. FOGWELL:

Q. I show you what Mr. Homan has labeled G-2. Will you be good enough to tell the jury what that is.

A. The contractor under date of February 25, 1952, submitted a request for relief. Under Title 2 of the first War Powers Act of 1941 as amended, the Act provides that the contractor can seek reimbursement for losses incurred or estimated to be incurred on a contract that appears to be a loss contract.

Q. What was the date of this hardship claim?

A. Well, it was submitted on 25 February 1952.

(7) Q. So that the original contract was entered into in 1950 and the hardship claim was made some two years later?

A. That is correct.

Q. And the contract terminated about a year after that; is that correct?

A. Well, the contract was terminated on 19 February 1953.

* * * (N. T. pp. 7 and 8.)

(8) (Document dated February 21, 1952, revised August 15, 1952, Schedule 1, marked Exhibit G-3.)

BY MR. FOGWELL:

Q. I show you a series of papers which Mr. Homan has labeled G-3. Can you tell us what that is?

A. Well, this is a schedule supporting the data handed to me by one of the officers or representatives of the contractor —that is Espey Manufacturing Company—at the hearing held in the Pentagon Building on 5 September 1952. This schedule was supposed to indicate the costs incurred to date and the costs estimated to complete of all of the contracts this contractor held with the Government. We are

particularly interested here in Order No. 21440 Phila. 50 and contractor's Job No. 381 in which the contractor indicated that costs in the amount of $26,000 had been (9) incurred, total costs, as of 15 August 1952.

Q. So that what you are saying is that the big sheet concerns itself with other Government contracts which Espey Company had with the Government?

A. That is correct. The total here is supposed to show those contracts which the contractor would make a profit on and those contracts on which he would lose money, and what the net loss for the production of those contracts would be to the contractor.

THE COURT: What was that, 15,000?

THE WITNESS: This was $26,000 total costs incurred.

BY MR. FOGWELL:

Q. And what, briefly, again is that $26,000 figure that Judge Ganey asked you about?

A. Well, it is indicated here as inventory by the schedule, what proportion I think, by close scrutiny, that this represents all the costs incurred as of that date.

Q. As of which date, sir?

A. As of ——

THE COURT: August 15.

THE WITNESS: August 15, 1952.

(Modification to Supplemental Agreement to Order No. 21440—Phila. 50-37, Contract No. DA-36-039-SC-3775 marked Exhibit G-4.)

(10) BY MR. FOGWELL:

Q. I show you G-4. What is that?

A. This is a modification or supplemental agreement to Order No. 21440 Phila. 50.

Q. What do you mean by that? Will you tell the ladies and gentlemen of the jury?

A. Well, "order No." is a designation of this particular contract. It is known as Order No. 21440 Phila., which means Philadelphia, and 50 is the year. It is also designated as Contract No. DA-36-039-SC, which means Signal Corps, 3775. Now, this modification was written to reflect the award made by the Appeals Board. The contractor claimed $1,300,000 representing losses incurred and alleged to be incurred to complete the contract. The Board awarded $600,000 as an increase in the contract consideration.

Q. You said to complete the job. If you know, to complete it to what date, sir?

A. Well, we would have no way we could determine what date the contractor would complete the contract.

Q. Did this item G-4 include all costs incurred to any specific date allegedly?

A. No; this is the amount that the Board awarded as being what they felt would be necessary for the contractor to continue in operation. There is no obligation upon the (11) Board to reimburse the contractor for all of his losses or any particular part of it; it is a matter of grace.

Q. Well then, the Board complied with this request?

A. That is right, and as a result of the Board's decision the contract was modified to increase the contract consideration by $600,000.

THE COURT: What is the date of G-4, please?

THE WITNESS: 1 October '52.

THE COURT: Did this eventuate from the hardship claim that was presented on the 15th of August?

THE WITNESS: That is right.

(Copy of Espey invoice dated 1-12-53 marked Exhibit G-5.)

BY MR. FOGWELL:

Q. All right, Mr. Moore, I show you G-5, which has one single green sheet and one white sheet, the green sheet having the heading Espey Manufacturing Company, Inc. I ask you what they are.

A. This is a copy of the invoice submitted by the Espey Manufacturing Company, Inc., under date of January 12, 1953, for reimbursement of costs incurred amounting to $370,000—$370,544.13—the contract was, after the original contract was modified to incorporate the progress payment article which provided that the company could be reimbursed with (12) 90 per cent of its direct costs. Direct costs are labor and material.

The contract—then by deducting 10 per cent from those costs submitted the invoice net was in the amount of $333,489.72. Now, attached to this invoice is a schedule of information purported to have been taken from the books of the contractor showing the expenses. These are items, direct material $366,662.11; direct labor $3,882.02; total $370,544.13.

* * * (N. T. pp. 12 and 13.)

(13) Q. In the progress payment request does the contractor certify as to the amount of work done—that is labor and materials?

A. Yes, he does.

Q. What was done in this one which is now labeled G-5?

A. Well, let me read the schedule here, the certification: "I certify that the above statement of costs is just and correct to the best of my knowledge and belief, that payment therefore has not been received, and that it has been prepared from the books of account and records of Espey Manufacturing Company, Inc., George Mastros, Controller."

Q. What is the date of that, that that progress payment was submitted?

A. Well, the progress payment voucher is dated January (14) 12, 1953. The accounting schedule is dated the same date, and I cannot tell exactly the date it was received in the Signal Corps, but likely a day or so after that.

Q. Do you see an item on there of $3,882.02?

A. Yes, that is for direct labor and would indicate—I think we could draw from that that that was all of the labor incurred as of that date.

THE COURT: What is it?

THE WITNESS: $3,882.02.

THE COURT: Let me be oriented again. The original contract was $2,752,422.75; is that right?

THE WITNESS: $2,752,422.75.

THE COURT: Now, on August 15 they showed a loss of $26,000 on all their jobs that they were doing including this contract; is that right?

THE WITNESS: No.

THE COURT: Let me skip that. That is not important. But I want to get down to G-4 where the Board made the authorization of $600,000.

THE WITNESS: Right.

THE COURT: Now, was that in addition to the 2 million? Did that bring the contract up to 3 million 352?

THE WITNESS: Yes, that includes the 2 million 752 thousand.

(15) THE COURT: So that October 1, 1952, the contract then with the Espey Corporation was $3,352,000; is that correct? When you add six hundred—we will assume my arithmetic was correct.

THE WITNESS: Well, we will show the discount involved. Before discount it was $3,599,537.02.

THE COURT: Then you come along with G-5. Did that invoice of the $370,000, less some 10 per cent, which left $333,489.72—have you that figure?

THE WITNESS: Well, no, I wouldn't have that figure for this reason: When we make a progress payment against a contract that is recouped subsequently through the deliveries of materials. It did not affect the contract consideration.

* * * (N. T. pp. 15 and 16.)

(16) BY MR. FOGWELL:

Q. Then to clear it up finally, sir, G-5, on this green sheet, as I read it, you have over Mr. Mastros' signature costs incurred from the inception of the contract of December 31, 1952; is that right?

A. That would be correct.

Q. And material of some $366,000; correct?

A. Right.

Q. But labor of a little less than $4,000?

A. $3,882.02.

Q. Up to what date?

THE COURT: January 12, 1953.

(17) THE WITNESS: Well, it was the date of the invoice. The labor is cost incurred up to 31 December 1952.

THE COURT: What is it you want pointed up as certified by this defendant, the $3,882.02?

MR. FOGWELL: Yes, sir; the fact that there was just a little less than $4,000 worth of labor allegedly expended up to the last day of 1952. I think that will be important in a minute when we show how much was alleged to have been spent about six months later than that.

MR. KOSSMAN: Of course, I won't object, but this is just a progress report. This is to get the advance payment? Right? This is a progress payment.

(Photostat of Settlement Proposal dated 3-31-53 marked Exhibit G-6.)

BY MR. FOGWELL:

Q. Now, Mr. Moore, Mr. Homan has labeled G-6 several papers at my request. Will you tell the judge and jury what these are, please.

A. This is the first termination settlement proposal submitted by the Espey Manufacturing Company to the Signal Corps. It is ——

Q. What is the date of this first settlement proposal?

A. This is dated 31 March 1953.

Q. Was there a letter submitted with that and covering it?

(18) A. Yes; it was transmitted by covering letter dated April 23, 1953.

* * * (N. T. p. 18.)

(Photostat of settlement proposal dated 6-2-53 marked Exhibit G-7.)

BY MR. FOGWELL:

(19) Q. I show you G-7. Mr. Moore, what is it?

A. Well, this is Termination Settlement Proposal No. 2 submitted by the Espey Manufacturing Company under date of June 2, 1953.

Q. Who submitted that?

A. It was transmitted by letter dated 4 June 1953 over the signature of George Mastros, Controller.

MR. KOSSMAN: May I see that, please.

(Settlement Proposal dated 7-31-53 marked Exhibit G-8.)

BY MR. FOGWELL:

Q. I show you G-8. What is that?

A. This is the next termination settlement proposal submitted.

THE COURT: Is that the third?

THE WITNESS: This is the third. These settlement proposals are submitted as the costs are accumulated from the records. This was submitted on 31 July 1953 and the covering letter of transmittal was dated 28 August 1953 over the signature of George Mastros, Controller.

BY MR. FOGWELL:

Q. All right, sir, so that what you are saying is that all three of these settlement proposals were submitted by Mr. Mastros; is that correct?

(20) A. That is correct.

Q. Or at least the covering letter with them individually.

A. Well, the covering letter was submitted by him, and I notice in the claim itself "Name of supervisory accounting official George Mastros."

Q. All right, I think you told the ladies and gentlemen

of the jury at my request when analyzing G-5, which was the progress payment report, that the amount of labor up to the last day of 1952 was some $3,882.02; is that right?

A. That is right.

Q. Would you tell the ladies and gentlemen of the jury the amount of engineering expense or labor claimed in each of the three settlement proposals?

A. Proposal No. 1 dated 31 March 53, the engineering costs were $161,560.62.

Q. I am sorry; I did not hear your figure.

A. 161,560.62. This was made up of material $9,098.86, labor $80,069.84, overhead—that is factory overhead—$92,810.04.

Q. As of what date is that?

A. Well, that was in Settlement Proposals Nos. 1 and 2. That is 3-31-53 and 6-2-53 respectively.

Q. All right, and the third one?

MR. KOSSMAN: What do you mean by "the third one"?

(21) MR. FOGWELL: The third settlement proposal.

MR. KOSSMAN: How about the second?

THE COURT: 1 and 2 are the same.

MR. KOSSMAN: I am sorry; I didn't get that. What was the date of that?

THE WITNESS: Which one?

MR. KOSSMAN: The second.

THE COURT: June 2.

THE WITNESS: June 2, 1953.

Now, Proposal No. 3 showed these same costs as material $11,837.06, labor $2,314.92, overhead $2,840.90, or a total of $16,992.88.

BY MR. FOGWELL:

Q. Now, was there a cost breakdown on the first settlement proposal?

THE COURT. Do we have to have the breakdown? Isn't the total sufficient?

MR. FOGWELL: I think that is labor, sir.

THE WITNESS: There was no cost breakdown.

THE COURT: We have a certain amount of figures to absorb.

MR. KOSSMAN: Didn't you say sixteen thousand something for the third one? Wasn't it originally 182,000?

THE WITNESS: The original No. 3 was 182,000. (22) I was looking at the amended proposal.

MR. KOSSMAN: Oh, there was an amended one after that?

THE COURT: Just a moment here. Was the original No. 3 not 16,992?

THE WITNESS: I am sorry, it was not.

THE COURT: All right, what was the original, before we got to the amendment?

THE WITNESS: I am not certain of these figures here.

THE COURT: Just take your time.

THE WITNESS: May I ask my man a question?

THE COURT: Mr. Fogwell, he wants to consult with you.

THE WITNESS: May I see Mr. Novak here. I am misinterpreting his figures.

THE COURT: I think that is quite all right.

MR. FOGWELL: It is certainly all right with me.

THE COURT: He wants to consult him on the figure.

MR. KOSSMAN: Sure, sure.

MR. FOGWELL: He may step down a moment if it is all right with the Court.

(23) THE WITNESS: I am sorry; I made an error in giving you a breakdown of Settlement Proposals Nos. 1 and 2. There is no breakdown on those two.

THE COURT: We are not concerned, I take it, with the breakdowns?

MR. FOGWELL: Not at this time at any rate, sir.

THE COURT: I need not concern myself with that then.

THE WITNESS: Settlement No. 3 is $182,005.74.

THE COURT: $182,005?

THE WITNESS: And 74 cents.

(Settlement Proposal dated 2-16-54 marked G-9.)

(Schedule of Accounting Information dated 3-31-53 marked G-10.)

* * * (N. T. pp. 23 and 24.)

(24) BY MR. FOGWELL:

Q. Mr. Moore, I show you another series of papers which Mr. Homan has labeled G-9 and ask you if you can tell the Court and jury what that is.

A. This is Amended Settlement Proposal No. 1 prepared as of 31 March 1953 submitted by the Espey Manufacturing Company to the Signal Corps.

THE COURT: July?

THE WITNESS: As of 31 March.

THE COURT: What year?

THE WITNESS: 1953, and this was submitted as of 16 February 1954—submitted on 16 February 1954.

BY MR. FOGWELL:

Q. Lastly I show you G-10 and ask you to tell the ladies and gentlemen of the jury what that is.

A. This is a photostatic copy of accounting information submitted as a part of the settlement proposal No. 1 dated March 31, 1953, signed by George Mastros, Controller.

Q. You say that G-10 is a schedule of accounting data or

(25) information.

A. Supporting the claim.

Q. Supporting which claim, sir?

A. The original claim dated 31 March 1953.

Q. Who did you say submitted this to the Government?

A. Well, it was submitted over the signature of George Mastros, the controller, for the company, of course.

Q. Would you be good enough to tell the ladies and gentlemen of the jury what Question 3 says on that form?

A. Question 3, entitled, "Independent Accountants, if any, who have reviewed or assisted in the preparation of the attached proposal, names Kalish, Rubinroit & Company, address 280 Broadway, New York 7, New York."

Q. And Question 5.

A. "Have there been any significant deviations from your regular accounting procedures and policies in arriving at the costs set forth in the attached proposal?" And there is a place for a check either yes or no, and it is checked "No."

Q. Question 8.

A. 8?

Q. Yes.

A. This is cut through the top, but I think it is, "If this settlement proposal is based on standard costs and (26) such costs are in excess of actual, has proper adjustment thereof for any significant variations been"—and I can't tell what this word is.

Q. Well, what is the answer to the question?

A. The answer is, "Costs are based on actual costs."

Q. Anything in there with reference to costs based on other than actual costs, i. e., estimates, et cetera?

A. No; Question No. 10 also refers to actual costs.

Q. No, I mean in Question 8 only—is there any data over Mr. Mastros' signature with reference to the fact that some of the costs were his estimates only.

A. There is none noted. It says, "Based on actual costs."

Q. Question No. 23.

A. This is also cut through the top. I believe it is, "Method of recording," I presume it is, "any costs (1) general engineering and general development expense and (2) engineering and development expense directly applicable to the terminated contract."

Answer, "Engineering time that can be applied to particular projects are allocated to those projects. Time that cannot be allocated to any particular project, general in purpose, is charged to overhead."

THE COURT: Mr. Fogwell, you have probably lived (27) with this. The jury and I, I am certain, do not understand this.

MR. FOGWELL: I realize that, Judge Ganey.

THE COURT: And it is just confusion confounded to go from one to the other. We ought to go along in some orderly fashion and give the jury some idea of what this is about.

Let me go back to the Amended Terminal Proposal of March 31, 1953, which was submitted March 16, 1954. Now, what is the purpose of advertence to that?

MR. FOGWELL: Well, sir, if Your Honor will just bear with us a little bit, my main purpose with this particular witness is to get the documents in question in evidence, and this is the last one. I am cognizant and appreciative, as Your Honor heard me say in my opening ——

THE COURT: All right, I will keep quiet. I don't understand it and I don't think the jury understands it.

MR. FOGWELL: I will clear it up with the witness fully, and if Your Honor will bear with us I am sure it will take a short time.

THE COURT: All right.

BY MR. FOGWELL:

Q. Before lunch, Mr. Moore, you told us about certain

breakdowns or lack of breakdowns, and, as Judge Ganey said, (28) I don't think we want to get into minute details of those breakdowns, but would you be good enough to give us the benefit briefly of what you now say about the breakdown for any of the settlement proposals, 1, 2 and 3.

A. Well, I was confused on the breakdown of Settlement Proposals Nos. 1 and 2. Those proposals did not include any breakdown whatever. The total of engineering costs was $161,560.62 on both proposals.

THE COURT: There was no breakdown on that at all?

THE WITNESS: Not on those two. Proposal No. 3 did, however, show a breakdown which was material $9,098.86, labor $80,096.84, overhead $92,810.04, total $182,005.74.

BY MR. FOGWELL:

Q. So making a total of labor and overhead of about $172,000 or so?

A. Yes.

THE COURT: One hundred eighty-two, wasn't it?

MR. FOGWELL: Well, sir, I am leaving out the material. The first of the three figures he read, nine thousand and some, I am leaving out, because I don't think it is related to labor. Is that right, Mr. Moore?

THE WITNESS: That is correct.

BY MR. FOGWELL:

Q. Some $172,000 of labor and overhead?

(29) A. About $172,900 some for labor and overhead.

Q. Now, how does that $172,000 of labor and overhead compare with G-5, if you still have it?

THE COURT: Before we get to that, may I correct my notes? Didn't you give us originally No. 3, engineering costs totaling $182,005.74?

THE WITNESS: Right.

THE COURT: Now, is that changed to $172,000?

THE WITNESS: No, the total is $182,000, but the $182,000 includes $9,098.86 for material, which is ——

THE COURT: Going to be left out.

THE WITNESS: That is unquestioned here. It is labor and overhead.

THE COURT: Is the total amount important, Mr. Fogwell?

MR. FOGWELL: Well, yes, sir.

THE COURT: Then it would be $182,000 minus $9,000, wouldn't it?

MR. FOGWELL: That is right, sir. That is correct. In round figures.

THE COURT: All right.

MR. KOSSMAN: Who got the money?

MR. FOGWELL: Ha, ha, ha.

THE WITNESS: You wanted me to comment on— (30) (indicating G-5) you want me to comment on this?

MR. FOGWELL: I think you have to answer Mr. Kossman's question.

THE COURT: Wait, are you through with him?

MR. FOGWELL: Yes.

CROSS-EXAMINATION.

BY MR. KOSSMAN:

Q. Will you answer my question now: Who got the money?

A. The progress payment?

Q. The money—the money the Government gave out.

A. Which money are you talking about?

Q. Any moneys from this contract.

A. The company.

Q. The company.

A. Right.

Q. By check?

A. Any money that was paid out was ordered paid to the assignee of the company.

Q. Well, was any money paid to this man?

A. No.

Q. That is one thing, then. Originally the contract was for a certain amount of money, am I right?

A. That is correct.

Q. Then the company asked for a hearing before the Board (31) and there was a hearing claiming hardship?

A. Correct.

Q. That hearing took place on September 4, 1952, right. 79th Meeting of Army Adjustment Board, Pentagon Building, Washington, D. C.; right?

A. I don't have my paper. That sounds right.

Q. Maybe Mr. Fogwell has it.

A. September 5, 1952.

Q. Well, I thought September 4. Maybe it went over. You were present there, right?

A. I was.

Q. Now, am I correct in saying that the reason for the hardship—well, what was the basis for the request for more money?

A. The allegations submitted by the contractor that there would be a loss of approximately $1,300,000.

Q. Why would there be a loss?

A. Well, maybe he underbid.

Q. What?

A. He may have underbid originally, or material costs may have advanced.

Q. Is that the reason?

A. I have no way of knowing what ——

Q. Well, you were present at the hearing?

(32) A. All I would know is what was alleged.

Q. I will try to refresh your memory. Now, you have the actual notes of the hearing there, correct?

A. No, I do not.

Q. Well, I have a copy of it. It is not too clear. Maybe the Government has it. You were present and heard everything that took place at that hearing; is that correct?

A. Yes, sir.

Q. There were generals there, colonels, counsel for the Board of the Secretary of Defense and Mr. Harris and Mr. H. E. Moore, Signal Corps Supply. You were there, right?

A. Right.

Q. Now, didn't you hear the statement made by one Lt. Arundel right there at the hearing that the reason the company was asking for all this extra money was because the model had not been submitted correctly by the Federal Telephone Company which had gotten huge sums of money and it required extra engineering work by the Espey Company or whatever the name of the company is—what is the name?

MR. FOGWELL: Espey.

BY MR. KOSSMAN:

Q. The Espey Company? Remember that?

A. It would be an impossibility for me to remember all the testimony.

Q. Now, I am going to read you what took place and I (33) will ask you if it is true. If you cannot remember, then I will ask the Government if they will bring it in. Do you know who Mr. Harris was? You know, don't you?

A. Yes, sir.

Q. Mr. Harris made this statement: One of the controlling factors is that, I think that the situation with respect to the model has been stressed, but really the holding factor in my opinion has been the drawing. Now, in order for this contractor to be able to produce he would have to have drawings which would give facts about openings which require tolerance within hundredths of an inch or thousandths of an inch, and the contractor certainly could not have performed this contract on the basis of the model itself.

Now, do you remember him saying that?

A. I can't remember that. He may have said it. I am not disputing it.

Q. Well, would you remember what you yourself said?

A. I am afraid not. This has been quite some time ago.

Q. Well now, I will ask you, and maybe you will, and if not I will ask whether the Government will stipulate that. Now, at this particular hearing you said also—by the way, he was present there, right?

A. I don't remember seeing him there; I am not certain. I assume he was, but I don't recall.

(34) Q. Do you remember whether Mr. Pinsley was there?

A. Mr. Nathan Pinsley was there, I remember that.

Q. He testified in order to get extra money in this hard-

ship—he had no reluctance to testify then, do you remember that?

A. Yes, I remember.

Q. Now, I will come back to what you said later, but you remember Mr. Pinsley stated, Mr. Morris Pinsley ——

THE COURT: Who was Morris Pinsley?

MR. KOSSMAN: He was the president.

MR. FOGWELL: No, the attorney.

MR. KOSSMAN: For this organization.

THE COURT: For the Espey Company?

MR. KOSSMAN: Yes.

BY MR. KOSSMAN:

Q. Do you remember granting the hardship claim giving them a couple hundred thousand dollars extra? Do you remember that?

A. We processed it and gave them $600,000 in accordance with the award.

Q. Now, here is what Mr.—does the Government have a copy of this hearing?

MR. FOGWELL: We have the findings.

MR. KOSSMAN: Well, don't they have the actual (35) hearing, the proceedings?

MR. FOGWELL: They may, Mr. Kossman. I don't have it personally.

MR. KOSSMAN: Would you ask the fellow with you if he has a copy to give the man to refresh his recollection.

MR. FOGWELL: We will be glad to give him anything we have, Mr. Kossman, but we don't have that. We have the findings of the Board.

I have no objection if you want to go up and read it with him.

MR. KOSSMAN: I don't want to read it with him. I will read it to him.

BY MR. KOSSMAN:

Q. Do you remember Mr. Pinsley stating as follows: Without digressing a moment we still do not have the Government drawings that they were supposed to give us. They are not available, but we went ahead and took the bull by the horns and developed this unit. We submitted it to the laboratories with the exception that we took it without prejudicing our rights, and they put it through the tests, and they said, "It is fine; it doesn't leak even if the Federal model does leak."

Do you remember there was some discussion (36) like that?

A. There may have been. I could not possibly remember.

Q. I am reading the actual proceeding.

A. I am telling you I don't remember it.

Q. Maybe your memory will refresh itself, because I am just reading little excerpts, the most important thing. After all there had to be a basis for your granting the money; am I right?

A. Right.

Q. "Of the four different models of this unit from the Government the Signal Corps inspector rejected every one of them. We don't want to put out equipment that is going to reflect upon our name. We went ahead and redesigned it, and it is about 98 per cent interchangeable with what Federal has except that ours works properly."

Now, do you remember anything like that?

A. I don't remember the exact words.

Q. Not the exact words.

A. I know there was controversy with respect to the drawings and the specs.

Q. All right, do you remember Mr. Morris Pinsley stating as follows: "We went through the trouble of going ahead and building this thing and giving it to the laboratories where at the present time it is approved, and up to this (37) time we haven't put in any charges to the Government for this development and engineering, but it was done just the same."

Do you remember him saying that?

A. I do not. He may have said it, but I don't recall it.

Q. Well, maybe I will save time, because I can't go through all these pages, thirty-three pages, and ask you if you remember; I am going to show you what purports to be a copy of the proceedings of the Army Contract Adjustment Board, Office of the Assistant Secretary of the Armies, 4th day of September, 1952, and I am going to have it marked Defendant's Exhibit No. 1 and ask you to look through this and tell me whether in your opinion this is a true and correct copy of what took place at that time, and then I will ask you questions based on what you yourself said and what other people said in your presence.

(Document consisting of thirty-three pages entitled Proceedings of the Army Contract Adjustment Board Office of the Assistant Secretary of the Army 4 September 1952 marked Exhibit D-1.)

BY THE COURT:

Q. I wonder, is there any part of that hearing you remember, sir?

(38) A. How could I be expected to remember? I have never seen this before.

Q. What you said there—I understand this hearing was predicated—you remembered that $600,000; is that correct?

MR. FOGWELL: That is correct, yes, sir.

THE COURT: Don't you remember anything about that hearing?

THE WITNESS: Well, yes, we had a hearing but I don't remember the exact wording.

THE COURT: He doesn't want the exact wording. Nobody expects that. But do you remember the substance of it?

THE WITNESS: Well, as I recall the allegations contained in the claim—this is from memory—there were first that there were changes in certain drawings, and I believe that the contractor alleged because of the delays that costs increased. Now, as to the details I have no further recollection.

MR. KOSSMAN: I will have this marked and maybe the Government can find a copy in their files.

BY MR. KOSSMAN:

Q. You remember Brigadier General Brown was there, don't you?

A. Yes, sir.

(39) Q. And Colonel Samuel F. Cohn, of the Office of the Assistant Secretary of the Army, Lt. Colonel Tippett?

A. Tippett?

Q. You remember that?

A. I have no doubt but what that is perfectly correct.

Q. Oh, I know it is. Now, on Page 6 you stated—see Mr. Moore—you stated as follows: "As I recall here from the correspondence here, it was not developed in sufficient time and there yet a great many changes being made during the course of the development and the Government was

unable to furnish firm drawings and specifications to the Espey Manufacturing Company." Do you remember saying that?

A. I don't recall these exact words, but if it is there I assume that I must have said it.

Q. On Page 14 do you remember Mr. Nathan Pinsley—who is the what, president—you know he is the president, don't you?

A. Yes, sir.

Q. Do you know him pretty well?

A. Quite well.

Q. You know his brother Sol quite well too?

A. I don't know Sol very well. I know Morris, the other brother, better.

Q. You don't know this man, do you?

(40) A. I wouldn't have remembered him; it might have been sometime since I last seen him.

Q. Do you remember Mr. Nathan Pinsley saying—you remember he was present at the hearing, don't you?

A. Yes, sir.

Q. We have attempted to preserve our legal position in the matter by telling the Government—and I think there is no dispute on this—that even up until today's date, Federal has not supplied to the Government the proper drawings on the AN/GRA-6 and we do not have any proper drawings on the AN/," whatever it is. "That, I think, is undisputed." Do you remember him saying that?

A. I don't remember, and I have no knowledge as to whether or not that is the fact.

MR. FOGWELL: If Your Honor please, I do not like to be captious, but I would think because this man has a great number of hearings I would imagine he could not be expected to remember what Mr. Nathan Pinsley or anyone else said, and I certainly have no objection if Mr. Kossman wants to subpoena Mr. Nathan Pinsley and have him say it again for the jury.

THE COURT: Well, I don't want to be gratuitous here, but I think these witnesses might refresh their memory about this. They are coming here to testify in the (41) case. They are Government witnesses, and I think a man ought to remember what he said at a hearing. I say that without disparaging this witness' testimony, but I think as to future witnesses they should refresh their memory before called to the stand as to what they are testifying about. Is that asking too much?

MR. FOGWELL: No, I certainly agree. I think Mr. Kossman is asking what someone else said.

THE COURT: It is cross-examination. It is pertinent. I just can't stop him on it.

MR. KOSSMAN: I will only ask him one more question, but I will serve notice on the Government that on my part of the case when it becomes necessary, and if, that the defendant will testify from this and the Government certainly should have this available.

BY MR. KOSSMAN:

Q. Now, do you remember Mr. Pinsley stating--that is Morris Pinsley—on Page 35, 33. I beg your pardon —— "We have well over $400,000 in case invested in the job, not including the engineering time which we had to put in in order to get the thing to a position where we accomplished the job without the Government's drawings"? You said you are familiar with Morris Pinsley. Do you remember him saying that? Do you remember him saying anything?

(42) A. I cannot remember the exact words, but if he did make that statement it would not coincide with the schedule that he submitted in support of the claim.

Q. Do you remember Morris Pinsley saying that?

A. I do not.

Q. Oh, you don't remember. You remember he did testify, though? Right?

A. I do; yes, sir.

Q. Now, what was the original contract? $1,308,419? Right?

A. The original contract without modifications was $2,752,422.75.

Q. You mean after that was amended?

A. No; then you added the $600,000 to that.

Q. Then you added $600,000 to that?

A. Yes.

Q. Now, that $600,000 was added during that particular hearing, right?

A. It was added as a result ——

Q. As a result of the hearing, so it pushed it up to $3,300,000; is that right?

THE COURT: That is right; $3,352,000. I think we can agree on that. You have so testified, I think, Mr. Moore, that that was in addition to the original contract.

(43) MR. KOSSMAN: Right.

THE WITNESS: $3,563,541.65.

THE COURT: 563 ——

THE WITNESS: $3,563,541.65.

THE COURT: Well, that doesn't add up—$2,752,000 plus $600,000 does not make $3,500,000; it makes $3,300,000.

THE WITNESS: Your Honor, I explained this morning, this was Modification No. 7, and there had been other changes between this original contract and this modification of the $600,000.

THE COURT: Does that difference of $200,000 weigh in the balance?

MR. FOGWELL: I don't think it is of great consequence, sir, although I think it will be at the close of the case.

THE COURT: All right.

BY MR. KOSSMAN:

Q. Tell me, am I correct that in the procedures, that settlement proposals by themselves are never final?

A. Are never final?

Q. Yes.

A. You are speaking now of a termination settlement proposal?

(44) Q. Yes.

A. They would always have to be filed as a basis for the claim.

Q. Yes, but they are interim "subject to change upward or downward"? Right?

A. Any interim proposal is, yes.

Q. Now, were all these interim proposals?

A. That is correct.

Q. That is correct. Now, am I correct in saying that the third proposal that was submitted by Mastros in terms of the signing of the letter of transmittal was $1,128,875.81? Right?

A. That is right.

Q. Now, that was withdrawn; is that correct? That was withdrawn and these extra engineering moneys eliminated; right?

A. The claim was not withdrawn. An amended claim was filed.

Q. Well, amended. The one was to be disregarded; right?

A. It was modified.

Q. But then another claim was filed by this organization for $1,400,000; that is about $270,000 more? Right? Even after this engineering amount of money?

A. Which claim are you now talking about?

(45) Q. The last claim.

THE COURT: No. 3.

BY MR. KOSSMAN:

Q. The most recent claim. The Government has not produced the most recent claim. They stopped at 3.

THE COURT: What is the most recent claim?

BY MR. KOSSMAN:

Q. Are you familiar with that?

A. We have the claims, but I do not have the most recent claim in my possession.

Q. Do you have it in your head?

A. I couldn't remember the amount of it.

Q. Did it ask for more money?

A. I don't know.

Q. Did you discuss it with Morris Pinsley?

A. Well, yes; we have negotiated to try to settle it.

Q. Well, I am telling you it is more money, $1,400,000. Now, you see fit ——

THE COURT: Just a minute. Can we agree on that, Mr. Fogwell?

MR. FOGWELL: I do not honestly know, sir. I think it concerns the civil phase of this case with the Espey Company, accordingly, although I don't think it is relevant; I was going to object, but I don't like to be (46) captious.

THE COURT: All right, Mr. Kossman.

BY MR. KOSSMAN:

Q. Well, if you have no memory of it I will leave it go on that basis. Now, I would like to get these exhibits you have been testifying from. By the way, there were 18,000 units supposed to be made for the Government that the Government paid out this—how much money has the Government paid out to the Pinsley company so far?

A. We made two progress payments. I don't have the information here. Do you have it there?

Q. Didn't you pay out over $565,000?

A. That sounds about like the amount that was paid to the assignee.

Q. When is the last time you talked to Morris Pinsley?

A. Last Friday.

Q. Last Friday. Did you know that Mr. Pinsley—by the way, did you testify before the Grand Jury?

A. No, I did not.

Q. You know, of course, that he has not been working for the Pinsley company since December of 1955?

A. I have been told that he is no longer associated with the company.

Q. Now, the assistant district attorney was at great (47) pains to ask you who signed the letter of transmittal on G-6 which is the first proposal, and you said correctly George Mastros; right?

A. Yes, sir.

Q. Now I am asking you, do you know who signed the actual proposal itself?

A. Well, I can tell you if you will let me have it a moment.

Q. That you don't remember?

A. Well, I cannot remember all these things.

Q. Who signed that? (Indicating.)

A. It looks like Sol Pinsley, Vice-President.

Q. Well, it is. When is the last time you talked to Sol Pinsley?

A. I don't recall whether I ever had a conversation with Sol Pinsley. I think Sol was interested in the engineering phase and I had little to do with that.

Q. Now, on G-7 the assistant district attorney took great pains to ask who signed the letter of transmittal for this particular termination claim. I am asking you, and I am showing you—who actually signed the settlement proposal for these huge sums of money?

A. This is Sol Pinsley, Vice-President.

Q. Do you know of your own knowledge if Mr. Sol Pinsley (48) was ever indicted for anything that he did in this connection?

A. No, I don't. I might say one thing, that this could not have been signed by Mr. Mastros, because it must be signed by an officer of the company. Mr. Mastros was not an officer.

Q. Well, I mean, why do you go to such great pains to say that? I see here it says "Title, Controller." Couldn't Mr. Mastros have signed over here where it says here, "Title"?

A. That is over here.

Q. No, that is over here just underneath this man's.

A. This says "Vice-President." Here is Mastros in here, and Controller right over his name.

Q. Couldn't that have been signed by the controller?

A. No, he is not an officer of the company.

Q. An officer of the company signed it, but as far as you know he was never indicted; is that correct?

A. That is correct.

Q. Neither was Morris Pinsley; is that correct?

A. I have no knowledge of that.

Q. Again, you don't know whether he is indicted or whether he is not indicted, and you talked to him last week.

A. That was not about this case.

Q. That was only about this case?

A. That was not about ——

(49) Q. Oh, it was about something else? Well, I will

take your word for that. And on G-8, which was the third proposal, the Government was very anxious—I beg your pardon, not the Government, the assistant district attorney was very anxious—to bring out that Mastros had signed the letter of transmittal. Am I correct in saying that Mr. Pinsley signed, Sol Pinsley signed that; is that correct?

A. Well, I can't see. Will you bring it up, please. We handle hundreds of these papers, as you no doubt are aware.

Q. That is right.

A. This one was signed by Sol Pinsley as vice-president.

Q. Have you had a case—you say you have had hundreds—have you ever testified in any case, claim case, since you have been associated with the Government, against the bookkeeper?

A. Not on a termination claim.

Q. No. How many of these have you handled? Thousands?

A. I have no way of knowing.

Q. Hundreds?

A. Hundreds, yes.

Q. In G-10, which was accounting information, that was signed by Mastros; correct?

(50) A. Yes, sir.

Q. And G-9, and that was the amended proposal dated February 16, 1954, the letter of transmittal was then signed by Nathan Pinsley; correct?

A. I can't tell you.

Q. I will show it to you. (Handing witness.) You have discussed this case with the Government before today, haven't you?

A. Yes, but I couldn't remember what is on all these papers. This is signed by Nathan Pinsley.

Q. Now, in this letter Nathan Pinsley—we are only talking about one company here in this particular contract—Nathan Pinsley—this letter is dated February 17, 1954—stated as follows: "Gentlemen, enclosed find six copies of Amended Settlement Proposal No. 1 as of March 31, 1953,

together with the necessary supporting termination inventory schedules"; correct?

A. Yes, sir.

Q. Now, "The above are submitted pursuant to our telegram dated November 6, 1953, and further in accordance with a conference held by the undersigned and Lt. Col. James L. Clark"; is that correct? Do you remember whether a telegram had been sent?

A. I feel sure that there was.

(51) Q. Now, did you know that after the last proposal —and I am referring to G-8 —— (To Mr. Fogwell) You have written here third proposal, but G-8 is dated—is that the third proposal—is dated March 3, 1953. There was a certain amount included for engineering; is that right?

THE WITNESS: You are speaking of the first No. 3 proposal now?

BY MR. KOSSMAN:

Q. Yes.

A. There was an amended No. 3 also.

Q. I am talking about the third proposal before the amendment.

THE COURT: That was July 31.

BY MR. KOSSMAN:

Q. That was $182,005.74.

THE COURT: $182,005.74.

BY MR. KOSSMAN:

Q. (Continued.) Do you know what took place after that proposal was made? Do you have any idea of what took place? Do you remember?

A. Well, I don't remember all the circumstances. I do remember there was an amended proposal filed under date of February 16, 1954.

Q. Well, isn't it true that there were discussions with (52) Government representatives between the date of that third proposal and the amended proposal, and as a result of those discussions the original claim based on the $180,000 was withdrawn, and Mr. Pinsley himself filed an amended proposal in which that was eliminated; is that correct?

A. It is my recollection that the first settlement proposal No. 3 was not withdrawn; that an amended settlement proposal was filed by the contractor on February 16, 1954. This was not as a result of any conversations had in the Signal Corps.

Q. Well, isn't the effect of filing the amended thing—it cancels out what took place?

A. No, it didn't cancel it.

Q. If someone files a claim for $100 and files an amended claim for $10, doesn't it eliminate the claim for $100?

A. It does not eliminate the information in the original proposal; however, it reduces the amount of the claim.

Q. It reduces the amount of the claim; correct?

A. Yes.

Q. Do you know why that was filed in the reduced amount?

A. I do not. That would be something for the contractor to state.

Q. And you never had a discussion with the Pinsleys about that, is that right?

(53) A. I listened to some conversation or some statements made by the Pinsleys concerning this.

Q. You listened, but you didn't do any talking?

A. No.

Q. Do you have any knowledge of the background of how much money, based on a contract, the engineering costs usually run where you have to do engineering work, where there are fifty engineers employed, where they have to make changes?

A. Well, you mean based on a percentage basis?

Q. Yes.

A. We would have no way we could make any comparison along that line, as the adjustments would depend on the number and extent of engineering changes and the type of material and the work involved in each one of the changes.

Q. Now, tell me this—in summarizing—the Government paid out a lot of money; is that correct? And there is a claim for more money still outstanding by the Messrs. Pinsley; is that correct?

A. The Government paid out money and there is still a balance due on the remaining portion.

Q. The Government never got delivery of anything from the Pinsleys; is that correct; in reference to this contract?

A. That is not correct. There was, according to my (54) recollection, about $129,000 worth of material delivered under this contract. The remaining portion of it was terminated.

Q. I am not talking about the material. They never got the models that were supposed to be used in tanks; is that right?

A. The models have reference only to the end item, the equipment itself. There are other items in this contract beside that.

Q. Did they ever get any of those 18,000 electronic units?

A. No, none of the end items.

Q. That they never got ready.

A. That is right.

Q. The contract was canceled by the Government; is that right?

A. For the convenience of the Government.

Q. For the convenience of the Government. Is there anything else that you can tell the jury about this case that I haven't asked you in questions?

A. Well, I can't recall anything. I would like to say this, that I was not trying to avoid anything that is in the minutes there of the hearing in Washington; it is just an impossibility for me to remember all these things.

(55) Q. But there was a hearing?

A. Oh, yes, sure.

Q. You were present?

A. I have no doubt—if you got that from Washington, the Pentagon—well, I have no doubt that that is correct.

MR. KOSSMAN: I haves no more questions.

* * * (N. T. pp. 55 to 60 inc.)

(60) RE-CROSS EXAMINATION.

BY MR. KOSSMAN:

Q. Tell me this: Do you know whether the amount of $180,000 for engineering was justified or not? Do you know?

A. I do not.

(61) Q. Of course, not. Do you know whether or not Mr. Pinsley had an ulterior motive in withdrawing that claim in order to get more money for other items? Do you know that?

A. I do not.

Q. Well, you talked to Mr. Pinsley, didn't you, last Friday? Right?

A. We weren't talking about this phase of this contract; we were trying to settle a termination claim.

Q. You mean he was asking for money from the Government; right?

A. Well, we were trying to agree upon how much the Government owed him yet on this terminated contract.

Q. Do you know part of the expenses that the Government had to shell out based on this claim was that Mr. Pinsley was collecting $32,000 a year for salary, plus expenses, plus driving a Cadillac? Do you know that?

A. I do not know what his salary was. I never had occasion to examine his books, but if they were legitimate salaries and expenses, of course, it would have to.

Q. That is part of the money the Government paid out for these 18,000 electronic units; right?

A. Whatever costs were acceptable would be included in the termination claim.

Q. And do you know whether part of this deal was $32,000 (62) plus expenses plus a car for the brother, Sol Pinsley?

A. I do not.

Q. You don't know that. Well, didn't you bother examining? Here is charges $64,000 plus expenses and cars. Before you paid out the Government money didn't you examine that?

A. We examined into all these costs.

Q. Well, you approved it then, didn't you?

A. Not yet.

Q. What is that?

A. Not yet. The settlement has not been finally concluded.

Q. How much money have you given so far to the Pinsleys?

A. There has been about $565,000, I believe it is, paid to the assignee.

Q. Well, that is the Pinsleys. What difference does it make. How much did you approve of that? The whole amount, didn't you?

A. Whatever was progress payments I would have approved, yes.

Q. Of course, you approved, and there is a claim for how much more? $900,000 more?

A. No. You mean over and above ——

Q. The $500,000.

A. I believe the amount—well, the amount claimed, (63) of course, is considerably different from what the Government feels is due, but it is less than a hundred thousand that the Government feels it owes.

Q. This engineering claim has nothing to do with what is going on now; is that correct?

A. Yes.

Q. Am I right?

A. Well, it has been withdrawn.

Q. This has been withdrawn completely, right? And it was not because he withdrew it?

A. It was because the company withdrew it.

Q. The company. Again, I ask you, did the company officials have a sinister motive in withdrawing this claim because there was a protest by somebody in the Government and others could cover up the huge swindle on other items? Do you know whether that is true or not?

A. I do not.

Q. You don't know. Do you know whether Mr. Nathan Pinsley when he was called by the Government to testify as a witness in the Grand Jury refused to testify on the grounds it might incriminate him?

A. I have heard that was the case, but I was not there. I don't know.

Q. Did it influence your giving out the moneys of the (64) Government to the Pinsley company at this stage of the game? Or one thing has nothing to do with the other?

A. Well, we tried to negotiate on a basis of what are legitimate costs allocable to the terminated portion of the contract.

MR. KOSSMAN: Well, the only thing I have to say is; take a look at the salaries and expenses and the Cadillac cars before you make a final adjustment; that is all.

RE-DIRECT EXAMINATION.

BY MR. FOGWELL:

Q. Do you know how much salary the Pinsleys were paying the defendant?

A. I do not.

MR. KOSSMAN: Well, I will tell you if you don't. It

was $300 a week, $15,000 a year, and it was reduced to $10,000 a year. Does that sound abnormal in your experience for accountants?

THE WITNESS: Well, I don't want to pass judgment on what the defendant did or how much his services are worth. I have no knowledge of that.

BY MR. FOGWELL:

Q. Mr. Kossman asked you whether you know whether the engineering and labor figures of $180,000 which were asked (65) for and then withdrawn could be substantiated, and I am not sure what you said, but as an auditor of this contract have you found substantiation for it?

A. Well, I am not an auditor, in the first place, but I don't know of any substantiation. If there had been, I don't believe the contractor would have withdrawn the amount.

MR. FOGWELL: That is all.

RE-CROSS EXAMINATION.

BY MR. KOSSMAN:

Q. You don't know whether there is substantiation, is that correct?

A. I do not.

MR. FOGWELL: Objected to.

MR. KOSSMAN: Well, you asked him.

MR. FOGWELL: That is what he said.

THE COURT: He said there was no substantiation.

BY MR. KOSSMAN:

Q. Did you say there is no substantiation for this?

A. None that I know of, otherwise the contractor surely would not have withdrawn it if he could substantiate it.

Q. In other words, that is your basis for saying there is no substantiation, but as a practical matter you don't know whether there was engineering time and overhead placed (66) in that particular contract which was withdrawn by the company for a sinister reason? Do you or don't you?

MR. FOGWELL: That is objected to. I think he said he didn't know.

THE COURT: There has been no objection made, but he says it cannot be substantiated, otherwise, they would not have withdrawn it. That is a conclusion which is not warranted and I am going to have to strike out his statement.

MR. FOGWELL: That is all.

ISADORE IRA FALCHUK, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

BY MR. FOGWELL:

Q. Speak loud so the jury can hear you, sir. Then we can hear you over here. Your name is Falchuk?

A. Yes, sir.

Q. By whom are you employed, sir?

A. I am employed by the New York Regional Office Army Audit Agency, New York City, 180 Varick Street.

Q. How long have you been so employed?

A. Since September, 1951.

Q. Did you in your capacity in the Army Audit Agency (67) have to do with a certain contract with the Espey Manufacturing Company?

A. I performed an audit at Espey Manufacturing Company in connection with a hardship claim submitted by that contractor.

BY THE COURT:

Q. When?

A. This was done during the month of March, 1952. The exact date is from March 11 to March 26, 1952.

BY MR. FOGWELL:

Q. And you say it concerned what was known as a hardship claim?

A. Yes, sir.

Q. Now, I show you two exhibits which have been labeled G-2 and G-3 and I ask you if you know what G-2 is.

A. G-2 is a copy of contractor's submission in connection with this particular hardship claim.

Q. Keep your voice up.

A. G-2 is the contractor's, that is, Espey Manufacturing Company's submission. It is in narrative form explaining why they should get relief under Executive Order 10210.

Q. And it is what is known as a hardship claim?

A. That is right.

BY THE COURT:

(68) Q. Is that the one dated February 25, 1952?

A. Yes, sir.

THE COURT: All right.

BY MR. FOGWELL:

Q. Did it pass across your desk as an auditor, so to speak?

A. I have a copy of that exact claim in my working papers; yes, sir.

Q. Do you know what G-3 is?

A. G-3 is a schedule in support of the narrative.

Q. I call your attention to a certain $26,000 figure inside of G-3 and ask you to tell us if you can what it is.

A. The $26,000 figure relates to the inventory under Job No. 381, which also is the job number designated for this particular contract.

Q. What do you mean by inventory?

A. Well, the inventory is the amount of money expended by Espey Manufacturing Company from the inception of the contract through December 31, 1951. That would be material, labor and overhead.

THE COURT: That is as of August 15, 1952?

THE WITNESS: No, I am sorry.

THE COURT: Was that filed on August 15, 1952?

THE WITNESS: It was filed—it was originally (69) on February 21, 1952, and later revised on August 15, 1952, but the amount of money spent is as of December 31, 1951.

THE COURT: As of November ——

THE WITNESS: December 31, 1951.

THE COURT: And that covered all the ——

THE WITNESS: All their costs to date.

THE COURT: On all their jobs?

THE WITNESS: No, I am sorry, Your Honor.

BY MR. FOGWELL:

Q. Just on Job 381, you mean?

A. Just on this particular contract. There is a list of all the jobs and how much money has been spent on each, and this $26,000 represents that amount relating to this specific contract.

THE COURT: I have in my notes that it was on all the jobs.

THE WITNESS: No, sir.

MR. FOGWELL: I think there may be just a little confusion.

BY MR. FOGWELL:

Q. What do you mean by Job 381?

A. 381 is a number that the contractor has designated to use to accumulate the costs under this contract. It is common procedure to use a number or letter or some symbol.

(70) Q. And it is the contractor's number only?

A. That is the number that he used to identify such things as labor, time tickets, material purchase invoices and other costs.

Q. The 381 under the contractor's number refers only to the contract itself which has a very long number and which has been put in evidence as G-1. I will give it to you if you want.

A. Well, G-1 is Signal Corps Order No. 21440 Phila. 50, and that is the same number that the contractor used in his schedule to show how much money has been spent to date on that particular contract.

Q. Now, holding up the large sheet which is attached to

G-3, down the lefthand side I think you will see a number of numbers as well as 381; is that correct?

A. Yes, sir; there is a list of numbers. There is one number designated on each one of these contracts listed here.

Q. There is one number designated for each contract that that contractor, Espey, had for the Government.

A. As of that date, yes, sir, of their prime contract.

Q. And then do you see the number 381 in that column?

A. I do, sir.

Q. Now, what is the number 381, then?

(71) A. 381 is a job number that the contractor has assigned to this particular contract.

Q. Right. Then what is the relationship between the $26,000 item to the right of No. 381, and No. 381?

A. Well, $26,000 represents the total amount of money spent by the contractor for manufacturing costs through December 31, 1951, under this particular contract or Job No. 381, which is synonymous.

MR. KOSSMAN: Are you reading that?

THE WITNESS: Yes, sir.

MR. KOSSMAN: What you just said—is that on that piece of paper?

THE WITNESS: Well, I also have the same sheet of paper in my work papers, which has the same data. That was submitted to me as part of the hardship claim at that time and this is the same sheet of paper.

BY MR. FOGWELL:

Q. Now, do you find an item of $919 on that?

A. 900? Beg your pardon?

Q. That is part of the breakdown of the $26,000 figure.

A. 919,000?

Q. Excuse me. I may have jumped ahead of you. Did you take a transcript of this when you looked down it?

A. Of this sheet?

(72) Q. No, sir; the hardship claim.

A. I beg your pardon, sir.

Q. When you looked down the hardship claim for Job No. 381 did you take a transcript of the job cost ledger sheet?

A. No, I did not, but I had an assistant, a colleague, that took a transcript of it.

Q. Well, was it done under your supervision?

A. It was, sir.

Q. Now, did you in your activity then determine the figure of $919?

A. Well, in my working papers there is a sheet which indicates that as of December 31, 1951, an amount of 919,000 —$919.59—was spent for engineering direct labor from the inception of the contract through December 31, 1951.

Q. From the beginning of the contract to what date?

A. Well, actually it is through January.

Q. Correct?

A. Through January, 1952.

Q. And it was less than a thousand dollars?

A. Yes, sir; I can give you month by month.

Q. That is all right. When you audited that contract did you see an account Contract No. 381E?

(73) A. No, sir.

Q. Was there such?

A. Not to my knowledge.

Q. Well, did you prove out the $26,000?

A. Yes, the $26,000 that the contractor submitted in his claim was verified through the books and records and it was approximately $26,000 to that date.

Q. Was the $919 for engineering labor a part of it?

A. Yes, sir.

Q. Was there any other labor?

A. There was a small amount of production labor through December 31.

Q. In what amounts?

A. Well, it would be around $225.

MR. FOGWELL: That is all.

BY THE COURT:

Q. When you say the $26,000 was proven out, what do you mean?

A. Well, the contractor submitted his claim, and in order to present this claim what he did, in effect, was to say that I will get 3 million dollars under the terms of the contract and it will cost me about 4 million 300 thousand dollars to perform this contract, therefore, I will lose approximately 1 million 300 thousand dollars (74) should I complete this contract on the old price, and the claim asked for an additional sales price increase of 1 million 300 thousand dollars in order for the contractor to break even.

Q. Yes, and they gave him 600 thousand afterward.

A. They negotiated at 600 thousand.

Q. What I want to know is whether the $26,000 item which represented manufacturing costs down through December 31, 1951, was proven out? Was there anything wrong with that figure?

A. No, there was nothing wrong with that figure.

Q. And that included the $900 which represented direct labor costs; is that right?

A. That is right. Maybe I can express myself in a different way. The way this claim was presented, what the contractor did was say, I spent $26,000 to date and I will spend an additional amount of money of approximately 4 million something, and it will cost me 4 million 300 some odd thousand dollars.

That is why he showed how much he spent to date; he was trying to project his entire cost. Cost to date plus cost to complete will be the total cost for the job.

CROSS-EXAMINATION.

(75) BY MR. KOSSMAN:

Q. When did you make this audit?

A. In March, 1952, sir.

Q. In March of 1952? Did you see him there? (Indicating defendant.)

A. No, sir; I don't believe he was employed at that time.

Q. Do you know when he started working?

A. No, sir.

Q. Would your records indicate in some way? Or did you ever come back after March, 1952?

A. No, sir.

Q. Anyhow there was a hearing on this petition for hardship; right?

A. Yes, sir.

Q. Do you know what happened? Do you have any knowledge?

A. I know they got something like $600,000.

Q. You know they got $600,000; right?

A. They didn't actually get $600,000; they got a price increase of $600,000.

Q. They got a price increase of $600,000?

A. But they didn't get it, because it was terminated.

Q. And, of course, you know the Government never got any of the 18,000 electronic units? Do you know that? Or (76) didn't you hear about that?

A. Well, I know there was a termination.

Q. I am only asking you, did they ever give the Government one unit out of the 18,000?

A. I don't know.

Q. That you don't. Now, 600,000 more over the original contract price that the Pinsleys had bid in competition with other people—they got 600,000 more in terms of contract price, right?

A. That is not correct, sir.

Q. In other words, they got a raise. They didn't actually get the money, but the contract price was raised 600,000, isn't that right, as a result of the hearing?

A. Well, you said they got 600,000 more than anyone else got.

Q. Not more than anyone else, more than their original contract price; right?

A. Yes, more than the original.

Q. Were you present at the hearing?

A. No, sir.

Q. You wouldn't know, therefore, that the Pinsleys claimed at that particular hearing that it would require a lot of engineering time, extra engineering time, to make the thing work. Do you know that or don't you know (77) that?

A. To make it work?

Q. To put out the product.

A. I wasn't there, sir.

Q. Well, I am asking you, do you know or don't you know anything beyond what you just testified?

A. I don't know anything beyond the date of my audit, sir.

* * * (N.T. pp. 77 to 84 inc.)

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(84) AUSTIN D. HOLLIS, having been duly sworn, was examined and testified as follows:

(85) DIRECT EXAMINATION.

BY MR. FOGWELL:

Q. Your name, sir, is Hollis; is that correct?

A. Correct.

Q. By whom are you employed, Mr. Hollis?

A. New York Branch, Auditor General, United States Air Force.

Q. Where is that?

A. 111 East 16th Street, New York.

Q. How long have you been so employed, sir?

A. Just short of five years.

Q. Therefore, you were employed there in the years 1952, '53 and '54?

A. I was.

Q. I show you a form which Mr. Homan has labeled G-11 and ask you if you are able to tell the jury what that is.

A. This is a photostat of a labor summary.

Q. Of what?

A. Of a labor summary for the month of September, 1951, furnished to me by Mr. Mastros.

(Document marked G-11 for identification.)

MR. KOSSMAN: Furnished by whom?

THE WITNESS: Mr. Mastros.

MR. KOSSMAN: The summary was furnished to you?

(86) THE WITNESS: A photostat.

MR. KOSSMAN: A photostat of the summary was furnished to you by the defendant here?

THE WITNESS: That is correct.

MR. KOSSMAN: Where?

THE WITNESS: At their offices on East 72nd Street, New York.

MR. KOSSMAN: When, sir?

THE WITNESS: During the month of May, 1953.

MR. KOSSMAN: And was that furnished to you in your official capacity?

THE WITNESS: Yes, it was.

MR. KOSSMAN: Is that the labor summary of September, 1951?

THE WITNESS: 1951, September, 1951, as I read it.

THE COURT: Given to you in 1953?

THE WITNESS: Furnished in 1953.

BY MR. FOGWELL:

Q. When in 1953, approximately?
A. Toward the end of May, last half of May.
Q. Do you have on there a certain job 381?
A. The No. 381, job No. 381, appears on here, yes.
Q. How much is listed there for engineering?

* * * (N. T. pp. 87 to 89 inc.)

(89) A. There is an amount of $148 in here against job 381 labeled as engineering.

(Document marked Exhibit G-12 for identification.)

MR. KOSSMAN: What is G-12?

MR. FOGWELL: Transcript of labor summary.

MR. KOSSMAN: For what month?

MR. FOGWELL: The beginning of the contract.

MR. KOSSMAN: 1950?

MR. FOGWELL: Yes.

MR. KOSSMAN: Till when?

MR. FOGWELL: Why don't we ask him?

(Counsel confer.)

BY MR. FOGWELL:

Q. I show you lastly Sheet G-12 and ask you if you are able to tell us what that is, Mr. Hollis?

A. This is a hand copy of the cost ledger itself for job No. 381 furnished to me by Mr. Mastros.

(90) Q. Does that show engineering labor?

THE COURT: When did he give it to you?

THE WITNESS: About June 17, 1953.

THE COURT: Thank you.

BY MR. FOGWELL:

Q. Where did he give it to you?

A. In the offices at East 72nd Street, New York City.

Q. Does this show or purport to show labor from the beginning of the contract?

A. Yes, it does.

Q. Well, from what date, then?

A. Beginning in July there is an accumulative amount prior to June 30, 1951, and then from there on it is itemized

by month through April, 1953. The total amount appearing thereon is $2314.92 as engineering labor.

THE COURT: Twenty-three what?

THE WITNESS: 2314.92.

BY MR. FOGWELL:

Q. Will you tell the ladies and gentlemen of the jury what you say this $2314.92 purports to be.

A. It purports to be engineering labor. In other words, engineering time devoted directly to this Job 381.

Q. Now, from what date to what date?

A. I cannot give you the exact beginning date from this (91) because there is a cumulative amount in there ending at June 30, but effective with July of 1951 it is itemized by months through April, 1953.

Q. Then is it correct to say that it does recite the sum of $2314.92 for engineering labor from the beginning of the contract to April, 1953?

A. Yes, sir.

Q. Did you discuss these matters with the defendant Mastros?

A. Not to any degree, no.

Q. Well, did you talk to him at all on this? Did you talk to anybody else in his office?

A. I don't think I did discuss it with anyone else. I probably spoke to him.

Q. Why?

A. Well, primarily because he did not want me to talk to anyone else; he wanted me to clear everything with him.

Q. How do you know that?

A. He told me so.

Q. How did he phrase it, if you recall?

A. I believe he told me that he wanted to know everything that went out of the office; he was going to furnish

it, and so on, or perhaps to assign the men to do it himself, (92) and he didn't want them interfered with otherwise.

Q. Did he tell you he wanted you to discuss these matters with him, not with the clerks and employees?

A. Yes.

CROSS-EXAMINATION.

BY MR. KOSSMAN:

* * * (N. T. pp. 92 and 93.)

(93) Q. Now, this business of—this last exhibit he gave you on January 17, 1953, a labor summary to April, 1953; is that correct?

A. Right.

Q. What was his purpose in giving you that?

A. I believe that this job was a termination or a part payment on a termination, a partial payment, as we call it.

Q. It was a progress payment; correct?

A. No; as distinguished from a progress payment, a partial payment on termination.

Q. I see. He told you then in terms of Job 381 that there was only $2300 worth of engineering?

A. That is what this statement says.

Q. That is what this statement says. Well, wasn't 381E in existence showing the additional engineering factors? And you discussed that with the defendant, the amendment?

(94) A. I don't remember discussing 381E in detail, however, I was aware that there was a 381E.

Q. That is correct. Now, do you have a copy of 381E with you?

A. I do not.

Q. Didn't the Government talk to you about 381E, the additional charges that he put on there identified as 381E?

A. No.

Q. What do you mean the Government did not discuss that with you?

A. No, they asked me about the engineering charge there.

Q. But they did not ask you whether there was any discussion about the additional engineering charges?

A. I think I was asked if there was any such thing.

Q. What did you tell the Government fellow?

A. I think I told him I knew there was.

Q. You did tell them. What did they tell you then?

A. Nothing.

Q. Nothing, but they did not ask you to discuss it—

A. No.

Q. —on direct examination?

A. No.

Q. No, of course not; but you did discuss 381E, the additional charges for engineering, at that particular time (95) when you were discussing 381?

A. My recollection is that it was discussed; yes.

Q. Now, wasn't a shop engineer by the name of Jack Pitcher there present with him?

A. I know the name, but that is about all I do recall.

Q. Do you recall that Jack Pitcher said in his opinion there was about $60,000 worth of engineering work not counting the overhead? Do you recall anything like that?

A. No, I don't.

Q. All right, now, I want to ask you this: Am I correct that you audited the interim settlement proposals 1 and 2 which were filed—right—between May and June, 1953; correct?

A. Well, I cannot identify them by number, but the job was to audit the interim proposal, yes.

Q. Now, did you receive all the cooperation from the accountant?

A. Yes.

Q. Am I correct that you made photostats of any paper —they made photostats for you of any paper you wanted; correct?

A. That is right.

Q. Correct. Now, am I right that during the course of the audit you to protect the Government read the contract (96) provisions, and as soon as the separate engineering costs were highlighted as 381E stated that you could not find any provision for the developing of engineering, and that you weren't sure you should approve it? Do you remember saying that?

A. You lost me there somewhere.

Q. I will repeat it. It is very important. Am I correct that during the course of the audit—you are making this audit of these proposals—you read the contract provisions, and you, in order to protect the Government, said to Mr. Mastros that since the separate engineering costs were highlighted as 381E and you could not find any provision for the development of engineering you were not sure you could approve it? Do you remember something like that?

A. I may have said something like that if that came to mind, yes.

Q. Don't you remember?

A. No, I do not.

Q. Well, is it possible that you said that?

A. Yes, it is.

Q. Now, do you remember Mr. Mastros telling you that he was at the Contract Adjustment Board Hearing and that there had been statements made of engineering work and that is (97) why this was changed, 381E, and you don't have to approve it if you don't want to, and you can take exception to it? Do you remember him telling you that?

A. I don't remember the latter part of it, however, he did tell me there had been some negotiating on the thing, and that was the extent of my knowledge on it, and that is also the extent of my recollection at this moment.

Q. Do you remember—think back, because it is very important, and the Government has not covered this thing —when they rehearsed with you what you should say, don't you remember that Mastros said not to approve the engineering costs that ran into $160,000 but to put it up for future consideration by the contracting officer?

A. I am resting entirely upon recollection now, but I don't believe there was any part of that engineering cost in the thing that I was dealing with when this paper was secured.

Q. Well, there was a discussion of 381E?

A. Yes, I think there probably was.

Q. Well, this is a photostat of 381E, and the amount there is $158,000, so there must have been that discussion about that amount.

(Counsel confer.)

Q. (Continued.) Is it your writing at the bottom?

(98) A. Yes, I believe it is now. Where did you say my writing is?

MR. KOSSMAN: You can ask him.

THE DEFENDANT: You added the $2300 to that total engineering.

THE WITNESS: That is not my writing. That is not my writing.

BY MR. KOSSMAN:

Q. Do you remember seeing something like this?

A. Yes, this looks like a photostat of the job ledger covering Job 381E. I remember the form of the ledger.

MR. FOGWELL: May I see it?

MR. KOSSMAN: You also have that copy in your records.

THE COURT: Do you know that, Mr. Kossman?

MR. KOSSMAN: No, I will ask some more questions.

BY MR. KOSSMAN:

Q. Now, you never checked the job cards, did you?

A. No.

Q. Do you know whether after you finished the audit the defendant offered to visit—what is it, the Air Force—the Air Force Office and go over the questions concerning the proposal with the reviewer, Mr. Goldenberg, and that he appeared with your company to justify this $160,000 for (99) engineering? There was no question about that; I am just informed; but he wanted to go over and discuss the whole matter with you, the overhead.

A. Yes, I believe it had to do with the termination and also with the system survey which was being conducted at about the same time.

Q. Were you present when Mr. Goldenberg wanted to know why he used this method of computing the overhead?

A. Yes.

Q. The hundred per cent?

A. Yes.

Q. So, therefore, right there and then, the defendant had asked for a hundred fifty or $160,000 engineering; he had marked it 381E; and you didn't believe that it should be granted and he was giving his reasons why; isn't that correct?

A. I don't think that was the subject of the conversation that I was in on.

Q. Well, wasn't the question of 100 per cent overhead involved?

A. It may have been.

Q. The defendant tells me this writing may have been Mr. Grossman's so I don't want any inference that it was your writing to be in the record. There is no question about (100) it in your mind; you discussed 381E; correct?

THE COURT: He said so.

THE WITNESS: Yes.

MR. KOSSMAN: Is there any question you want to ask, Mr. Mastros?

THE COURT: You had better pose it through your counsel.

BY MR. KOSSMAN:

Q. Did he agree to make an adjustment in that in terms of the overhead in your presence?

A. Are you speaking now as to the cost question from the overhead pool? I think he did, probably did, agree to some deletions from the pool.

Q. Didn't he agree to even reconstruct the overhead for the years 1951 to 1952 which were in the past years and which it was not even necessary for him to do, and departmentalize the overhead?

A. There was some discussion of that, but I don't remember that he agreed to do it or offered to do it.

Q. But there was some discussion?

A. I think there was some.

Q. Well, wasn't that the reason why they withdrew the claim and then they filed another claim eliminating the engineering?

(101) A. I am not entirely clear about that?

Q. Well, that is all you know about the case; is that correct; what you have testified?

A. Yes, I think so.

MR. KOSSMAN: That is all.

RE-DIRECT EXAMINATION.

BY MR. FOGWELL:

Q. When did you first hear about Account No. 381E?

MR. KOSSMAN: I believe he testified right there and then at the hearing, if Your Honor please.

THE COURT: Well, this is his witness.

THE WITNESS: I think it was in June, 1953.

BY MR. FOGWELL:

Q. Did I tell you to keep quiet about it?
A. No.
Q. Did you know that this Account 381E, even though it purported to cover the contract which started back in 1950, was set up specially as late as March of 1953, subsequent to the termination of Contract 381?
A. I was not fully aware of that, no.
Q. Did you know that the defendant Mastros set up 381E as late as March of 1953 and took a great number of hours from time cards from other contracts, to build up Contract 381 on this settlement proposal?

MR. KOSSMAN: I object.

(102) THE COURT: Yes, you should not lead this witness. Strike that out.

MR. FOGWELL: I think Mr. Kossman opened the door to this.

THE COURT: But you can ask him without leading him.

MR. FOGWELL: I think that is all.

(Photostat of ledger sheets relating to 381E marked Exhibit D-2.)

THE COURT: Is it your exhibit?

MR. FOGWELL: No, sir; I don't believe we need it.

LOUIS L. WEISS, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

BY MR. FOGWELL:

Q. Your name is Weiss; is that correct?

A. Yes, sir.

Q. Keep your voice good and loud so the last two ladies in the jury box can hear you. By whom are you employed?

A. I am employed by the United States General Accounting Office.

Q. Where?

A. New York Regional Office located at 346 Broadway (103) New York.

Q. How long have you been with the Government?

A. I have been with the Government since 1941.

Q. And did you have to do with a certain contract with Espey Manufacturing Company?

A. Yes, sir.

Q. What was your connection with that contract?

A. On March 20, 1953, we in New York received an as-

signment from our Washington Office to visit Espey with regards to the administrative review of hardship claims in general and Espey in particular.

Q. And did you call at the Espey Office sometime in March of 1953?

A. Yes, sir.

Q. Do you remember the date of your first call there?

A. On March 27 I first visited Espey.

Q. And who did you talk to on that date?

A. I spoke to Mr. Mastros on that date.

Q. Do you know Mr. Mastros by sight?

A. Yes, sir.

Q. Do you see him in the courtroom here today?

A. Yes, sir.

Q. Would you tell the ladies and gentlemen of the jury where he is.

(104) A. He is the gentleman located right directly in front of me.

Q. In the gray suit?

A. Yes, gray suit.

Q. Next to Mr. Kossman?

A. Next to Mr. Kossman.

Q. Did you talk to Mr. Mastros on that March 27, 1953?

A. Yes, sir.

Q. Did you ask him for any papers or books of Espey?

A. I did.

Q. What did you ask him for, in brief?

A. I asked him for the contract records pertinent to the Signal Corps Contract 3775, Job order 381.

Q. You asked him for certain papers of the company with respect to this Job 381?

A. That is correct, sir.

Q. Did he make them available to you?

A. At that time he did not make them available to me, stating that in about two weeks they would be available.

Q. Why didn't he give them to you that day?

A. He stated that they were working on the processing of a termination claim on Job Order 381.

Q. Were you prepared to audit them that day?

A. Yes, sir.

(105) Q. And yet you could not do so?

A. No, sir.

Q. Is that correct?

A. That is correct, sir.

Q. Did you call at the Espey Company at a later date?

A. Yes, sir.

Q. What date, if you recall?

A. On April 7 I called at Espey again.

Q. Who did you see there at that time?

A. I saw three gentlemen on that particular day. I saw Mr. Morris Pinsley, lawyer for Espey. I saw Mr. Hyman Rubinroit, one of the outside accountant for Espey, and I saw Mr. Mastros, Controller for Espey.

Q. So you saw Mr. Mastros, controller; Mr. Rubinroit, outside accountant; and Mr. Morris Pinsley, the corporation's counsel.

A. Yes, sir.

Q. What transpired at that meeting?

THE COURT: Excuse me. Before you go on to that, what did he tell you they were processing?

THE WITNESS: They were processing a termination claim pertinent to this contract.

BY MR. FOGWELL:

Q. What happened when you interviewed the three (106) gentlemen on April 7, 1953?

A. On that particular date the records were made available to me—only one specific record, which record was a job cost sheet of Job Order 381.

Q. The job cost sheet was made available.

A. Yes, and other minor records. If you would like me to enumerate them, I will.

Q. Well, when you first went in on April 7, 1953, who did you talk to first?

A. I spoke to Mr. Mastros.

Q. And this was two weeks after your first interview, approximately? Correct? The first interview, you had asked for certain records and were not able to get them?

A. That is right.

Q. When you went in the second time you saw Mr. Mastros first?

A. I saw a combination of three gentlemen there.

Q. Did you get the records promptly?

A. After extended discussion and apparent reluctance I did receive one record and one record only.

Q. Now, what do you mean by "reluctance"?

A. Well, questions were directed at me, why I needed the record, the records were incomplete; why look at incomplete records? And that was basically the reason for why I say (107) reluctance in giving me records.

Q. Did you tell them, Mr. Weiss, the nature of your visit as to why you needed to examine certain records?

A. Yes, sir.

Q. And after you so did, did they still not give them to you?

A. Yes.

Q. Well, did you finally get this one particular record you are speaking about?

A. Yes.

Q. And what was that record?

A. It was a job order cost summary sheet for Job Order 381.

Q. A job order cost summary sheet?

A. Job order sheet, we usually call it.

Q. Now, you say you got this after some time—you got this one record and this one record only; is that right?

A. That is, with the exception of a job time sheet, a form. That is the only two records I received.

Q. Did you ask for other records?

A. Yes.

Q. Were you turned down on that?

A. I was told they were being used for the processing of (108) the termination claim and that that is the reason I was being deferred.

Q. The job cost ledger which you did get—what did it show for labor?

A. Well, let's see. I have this in my hands here. Well there are two kinds of labor—engineering labor $2314, production labor $2328.

Q. So you had one item of 2314; that was what kind of labor, sir?

A. Engineering.

Q. For what period? From when to when?

A. The record was the total cost recorded as of 3/31/53, which means from the time the job started right up through 3/31/53.

Q. So that in effect you were there in March—

A. Four-seven.

Q. —and then again in April, and in April you finally got the records from the inception of the contract up to 3/31/53; is that right?

A. That is correct.

Q. And they showed engineering labor of some $2300?

A. That is right.

Q. And the other labor was what kind?

A. Production labor.

(109) Q. For the same period?

A. Yes, sir.

Q. And about the same amount; is that right? 2328 instead of 2314?

A. That is it.

* * * (N. T. p. 109.)

(110) Q. You say this was in April, 1953?

A. Yes, sir.

Q. Did they tell you anything about some modifications to any weekly, daily, time sheets or schedules?

A. They did indicate two things in that area: The first thing is that job time cards were being more accurately built up since November of 1952. That was the first thing they did. The second thing, they told me that there was approximately $75,000—Mr. Rubinroit did—he told me there was about $75,000 worth of additional engineering labor which was not included in the figures I just mentioned to you.

Q. Did they have anything to back that up?

A. No, sir; not at that time that I was there.

Q. Well, did they tell you where this had come from, the cumulative sheets, the analysis sheets?

A. Yes, they told me it was a contractor's policy not to distribute labor for pre-production payroll until production was initiated, and it was not yet fully distributed at the time I was there.

Q. But they did not show you anything in support of these job summary sheets?

A. No, sir.

Q. Now, I have asked you a number of questions, and when (111) I said "they" am I correct that at the time these questions and answers were put forth that Mr. Mastros, Mr. Morris Pinsley, Mr. Rubinroit and yourself were all there?

A. We were there, but Mr. Rubinroit and Mr. Pinsley did all the talking. Mastros was silent.

Q. But Mr. Mastros heard it all and was right there?

A. Yes.

THE COURT: The job costs were being built up, did you say, on those two modifications from November, or until November, 1952?

THE WITNESS: I stated the costs were built up to March 31 of 1953. The figures I just recited.

THE COURT: Yes, but you said there were two modifications.

THE WITNESS: I indicated that the internal system changed in November of 1952 wherein job costs were more accurately built up by certain type of summaries.

BY MR. FOGWELL:

Q. That is what they told you?
A. That is what they stated to me.

MR. FOGWELL: That is all

CROSS-EXAMINATION.

BY MR. KOSSMAN:

Q. Now, when you came here—and you can refresh your (112) memory by any comparison you have—Mr. Mastros told you the record was incomplete; is that correct?
A. That is absolutely correct.
Q. Absolutely correct?

* * * (N. T. pp. 112 to 114 inc.)

(114) BY MR. KOSSMAN:

Q. Don't you have any papers with you that you were using to refresh your memory?
A. Yes, sir.

MR. KOSSMAN: What was the last question that I asked the witness and his answer?

(The reporter read as follows:

"BY MR. KOSSMAN:

"Q. Now, when you came there—and you can refresh your memory by any comparison you have—Mr. Mastros told you the record was incomplete; is that correct?

"A. That is absolutely correct.

"Q. Absolutely correct.")

BY MR. KOSSMAN:

Q. Now, when you came there in order to audit this hardship claim you did not give Mr. Mastros or Espey Manufacturing Company any notice, did you?

A. No, sir.

(115) Q. You just came in; right?

A. That is correct.

Q. Now, am I correct in saying, do you know, that this was not Espey Corporation's only contract; they had around $20,000,000 worth of other contracts? Do you know anything about that?

A. I understood they had other Government contracts.

Q. Some of which were in process of being worked, some of which had been completed; is that correct? At that particular time?

A. I would assume so.

Q. But you only came about this particular contract, this particular one; is that correct?

A. Yes, sir.

Q. Now, you were told at that time that there was a change being made increasing what had originally been on the books and on the time cards as allocated to this particular job for around $2300, that it was being raised to $75,000?

A. No, this is on the second visit. The first visit as you remember, had—

Q. I beg your pardon; the first visit nothing happened?

A. Yes.

Q. So you came back on the second visit and they told you (116) what I just stated; is that correct?

A. That is correct, the second visit.

Q. Now, you are a Government man; do you know whether the original charge for $2000 that was on the books and on the time card—which was on the job cost sheet—do you know whether that really was true or whether it should have been $75,000?

A. I do not know whether it should have been $75,000 or $750,000 or $3000.

Q. Then you don't know—of course not—you don't know whether the $2000 was correct or whether it was incorrect; right?

A. I would say this, that the records indicated on that date $2000 was correct.

Q. Yes, $2000 was written there.

A. That is correct.

Q. But you don't know whether that charge from an accounting and an engineering analysis was incorrect and that another person upon revaluation might have made it $75,000; is that correct.

A. Counselor, no evidence was submitted to me to show that $75,000 was correct. Nothing was given me.

Q. But they told you they raised it to $75,000.

A. They told me there would be about $75,000 additional (117) engineering labor.

Q. Now, did you ask them for the evidence?

A. Yes, sir.

Q. What did they say?

THE COURT: Keep your voice up.

BY MR. KOSSMAN:

Q. What did they say?

A. It was not available.

Q. It was not available. Did they tell you the time cards were being corrected?

A. They told me the payroll was not yet fully distrib-

uted. That was the point they made. In other words, the payroll charge was not fully distributed to 381 because the policy was not to distribute payroll for pre-production labor until production was initiated, and that distribution was not yet made, so they said.

Q. Am I right as a practical proposition that they couldn't get any money, the company, until you had audited; is that right?

A. Well, my interest in this case was purely on a hardship claim.

Q. Yes.

A. Rather than a termination, consequently I was not involved on termination at all.

(118) Q. You just came in to check up about hardship?

A. That is correct.

Q. And they told you they were going to raise engineering to $75,000 or $750,000, is that right?

A. That is pertinent to the termination claim.

Q. What is that?

A. That relates only to the termination claim.

Q. That is true, but it may well relate in terms of how it is allocated, but they told you that; is that correct?

A. They did so state that.

Q. There is no question about that?

A. That is right.

Q. Now, were you shown that fact—you came about Job 381; is that correct?

A. That is absolutely correct.

Q. Now, am I correct that he had prepared—there were about fifty contracts—he had audited and submitted returns on about twenty or thirty contracts? Or wouldn't you know anything about that?

A. No; nothing about it. I am not even involved in that.

Q. O. K. Would you know about 381-E?

A. Never heard of it until this—yesterday.

Q. Until yesterday. And you left; right?

(119) A. That is correct. On four-seven I left.

Q. Did you ever come back any more?

A. No, sir.

* * * (N. T., pp. 119 and 120.)

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(121) CARL S. GROSSMAN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

BY MR. FOGWELL:

Q. Your name, sir, is Grossman; is that right?

A. That is right.

Q. By whom, Mr. Grossman, are you employed?

A. By the Auditor General, Department of the Air Force.

Q. United States Government?

A. Yes, sir.

Q. And in what location?

A. Presently we are at 111 East 16th Street, New York City.

Q. Did you have occasion to visit the Espey Manufacturing Company in September, 1953?

A. Yes.

Q. Well, do you remember the exact date?

A. Approximately September 16, 1953.

Q. Who did you see, or where did you visit the Espey Manufacturing Company?

A. At 528 East 72nd Street, New York City.

Q. Who did you see there?

A. My initial contact was with Mr. Mastros, the controller.

(122) Q. That is the Mr. Mastros here sitting next to Mr. Kossman?

A. Yes.

Q. What was your mission there?

A. I was assigned by my office to audit Proposal No. 3, which was a termination settlement proposal under the contract, and I was assisted by Major Dawn and Mr. Henry Hayman, and I was given the termination settlement proposal by my office, went over to Espey Manufacturing Company and made contact with Mr. Mastros, the controller, and asked for some of the supporting information to support the termination settlement proposal claim.

Q. Let me interrupt you a second. I show you what the court stenographer has labeled G-8 and ask you if you are familiar with that document, and if so, what is it?

A. Yes, sir; this is Proposal No. 3 which was an interim proposal, and it set forth the termination costs which were applicable to this particular prime contract, and it was dated July 31, 1953, and signed by Mr. Sol Pinsley, vice-president of the Espey Manufacturing Company.

Q. That was your mission there when you went there in September, or about September 16, 1953, to audit that proposal, in fact?

A. Yes.

(123) Q. Did you ask for certain substantiating documents?

A. Yes.

Q. From whom?

A. From Mr. Mastros.

Q. How long were you there, approximately, at that time?

A. Approximately two weeks.

Q. What was the sum and substance of what transpired at that time?

A. On September 21, 1953, I had come back from lunch and walked into the accounting office—I might add that we had been working in a conference room which was located some several feet from the office itself—and so coming back from lunch on September 21 I walked into the payroll department and noticed payroll cards, which is the basis for

the accumulation of charges to jobs—in other words, the back of the clock card indicate which jobs are to be charged, that is, both direct labor and direct engineering

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Q. Now, will you stop right there. I show you here a card which Mr. Homan has labeled G-13 and ask you if that is the type of card you mean.

(Time card dated August 12, 1950, in the name of Edward Robinson marked Exhibit G-13.)

A. Yes, I would say this is the type of card that was used.

Q. The base payroll card?

(124) A. Yes, the actual record which was used as a basis for charging various jobs, direct labor, both production labor and engineering labor.

Q. Though that card is practically blank, tell the ladies and gentlemen of the jury, using that card as a sample, what the front and back of that are all about.

A. The front of the card identifies the employee by clock number, social security number and employee's name, and indicates the payroll week ending. The front part, they use a clock setup where the employee would clock in and out for the day. On the back of the card the first column indicates the job number, and then you have the days indicated for the week, and it would show—in other words, at the end of a week it would show the various jobs or job charged and the total hours to be charged and the total salary cost. This was the source information used by the payroll department to accumulate its weekly charges to the various jobs and its monthly recapitulation summaries to jobs, which are then posted to the individual job ledgers by job number.

Q. So it is correct to say that that payroll card, that type of card, in effect serves two purposes; one, to tell the company how much to pay that particular employee; and secondly to tell the company how much time pertaining to

that (125) employee should be charged to Job X, Job Y, and so on.

A. That is correct.

Q. Go ahead; I don't want to interrupt you.

A. Well, when I did come back from lunch on September 21, 1953, I had seen these cards on the payroll desk, and out of curiosity I just went to the top card and turned it over just to see which job was charged. I noticed that the time which should have been indicated as a charge to a job was blank, so I thumbed through a few more cards and I noticed that they were blank, and I had Major Dawn go through all the cards, and out of the 187 cards approximately 118 were not charged to any jobs. I then asked the payroll clerk, when he came back from lunch, as to why there was no job charge made on the back of the time cards and he expressed—was a little surprised—and we had then gone out to the production floor to interview employees and supervisors to find out why these charges which should have been taken care of before they had come into the payroll section for that particular week—there were so many cards without these proper charges.

Upon leaving the production floor I happened to see one of the women employees working on an item and I walked over to her and asked her what type of item that was, and she said it was a commercial item, and I said, (126) "Approximately how many weeks have you been working on this job?" She said, "About three."

I said, "Did anybody else assist you on this?" And she mentioned two other employees and gave me their clock numbers, and I went back to the payroll section, and those three individuals, their charges for the week ending September 19 were blank, but going back to the previous week I saw that the charges were being made to Job No. 437, which was another big Air Force contract which was subject to audit at a later date.

I gave these findings to Mr. Mastros, and on September 22, 1953, he issued a memorandum to foremen and super-

visory personnel apprising them of what I had found, or—correction— apprising them that it was important for them to record the time to jobs properly.

Q. Now, when you said a minute ago, "a commercial item", what did you mean?

A. Well, the company did have a certain amount of commercial work which was not under Government contracts —that is prime or as a subcontractor.

Q. You mean a non-Government contract?

A. Yes.

Q. Hence a commercial one?

A. Yes.

(127) Q. All right; then what happened after that?

A. I completed my audit of the termination claim settlement proposal No. 3, and as a matter of fact after I had found this irregularity in the payroll recording, the next day Mr. Rubinroit and Mr. Kalish, the outside accountants for Espey Manufacturing Company, came into the office and they were very much concerned over what happened, and Mr. Kalish was very solicitous and asked me if he could analyze some of the accounts for me and help to expedite the audit. I told him I was very appreciative, but I felt that we were almost through, and on October 1, 1953, we had completed the audit and I discussed my findings with Mr. Rubinroit. There were certain adjustments made to various overhead accounts— I should say the usual type of adjustments which we make; they were not unusual—and when I had completed discussing my findings Mr. Rubinroit concurred in my adjustments generally.

He then said, "How about the engineering labor?"

I said, "Well, I didn't make any adjustments to that." I felt, based on the tests we made and the clock cards and job cards, and tying it into the weekly and monthly summaries, I didn't feel there was any basis for questioning any of it; however, I did, just out of possibly a reaction to him and possibly due to the irregularity (128) I found in the floor check, I said to him that I thought the engineering

labor looked excessive, but as far as my determination auditwise I found that they have the records to support the amount which was included.

On October 2, 1953, I went back to my office at 70 East 10th Street, at the time, and I spoke to my chief, and for some reason I was not entirely satisfied with the claim, so despite the usual audit steps and tests we made, perhaps it was the atmosphere there or the way things were conducted generally which made me a little unhappy with my findings, or what I had found. I then asked for permission from my chief to visit the Army Audit Agency at 180 Varick Street, because I was familiar with the fact that they did have a hardship claim, or in briefing in this contract I noticed the settlement to the contract where they had gotten this adjustment of $600,000 on this contract, and I know that when an Audit Agency performs any work on a hardship claim they do have certain supporting working papers, so I told my chief that just out of curiosity, since we know that some work was done on this same contract, I would like to go down and look at their working papers to see just what information might be useful.

I went down to the Auditing Agency on October 5, 1953, and contacted the auditor, Mr. Falchuk, who performed (129) the work on the hardship claim, and asked to see his working papers. In going through the working papers I noticed this transcript which was made of the 381 job, which was the identification of this particular contract for the recording and charging of costs to this particular contract, and the three—and the transcript identified as Job No. 381 showed that the engineering labor as of December 31, 1951, amounted to a little over $919, whereas my claim for the same period or the same cutoff period of December 31, 1951, showed an amount of over $72,000 for engineering labor. This $72,000 was taken from a buildup of engineering charges under 381E, and I asked Mr. Falchuk if he ever saw this 381E job, and he said, "This was all we got at the time we did the hardship claim," so ——

Q. Did that surprise you, the contrast between $919 and $72,000 labor for the same period?

A. Yes, it was quite a surprise, and I didn't want to jump to any conclusions. I was able to sign out for the Army Audit working papers and took them back to my office and showed this apparent discrepancy to Mr. Goldenberg who was the chief reviewer in the New York Branch Office, and to my chief. We felt that we certainly could not process this claim unless we were able to get additional information. I know that Mr. Goldenberg picked it up from there and (130) called Espey Manufacturing Company. I believe he spoke to Mr. Mastros. And Mr. Mastros, I was told, said that Mr. Rubinroit—that he would have to call Mr. Rubinroit and arrange for an appointment. I was then told by Mr. Goldenberg that Mr. Kalish had telephoned back on Tuesday, October 6, and made an appointment for Mr. Goldenberg and myself to meet with Mr. Rubinroit on October 7 at one p. m. at Espey Manufacturing Company.

Q. So that we do not lose track of the cast of characters here, who, again, was Mr. Kalish?

A. Mr. Kalish is one of the partners in the outside accounting firm of Kalish, Rubinroit & Co.

Q. Accountants for Espey?

A. For Espey Manufacturing.

Q. Independent, non-employee accountants?

A. Yes.

Q. Excuse me; what happened on October 7, 1953, as a matter of fact?

A. On October 7, 1953, Mr. Goldenberg and myself went back to Espey Manufacturing Company, and met with Mr. Rubinroit, and looking through the Army Audit working papers we had noticed this particular schedule which indicated how they came up with the proposed loss of over a million dollars on this contract, and they had an inventory of the jobs (131) which were open as of December 31, 1951, which at least was the—which represented the costs incurred up through December 31, 1951, and was used as a

basis, since they prepared their claim in February, 1952, and we had noticed that the 381 job had approximately $26,000 charged to it as of December 31, 1951, and of course, there were all the other jobs represented by incurred costs, the inventory as of December 31, 1951.

Q. Excuse me a minute: $26,000 applied to Job 381 up to December 31, 1951? Do you mean the total costs?

A. Yes, it represents all the direct charges—that is, material, labor, for direct factory labor and engineering labor, and other direct costs and the overhead allocations.

Q. How did that figure tie in with the $72,000 figure you spoke about?

THE COURT: Before we get to that, the amount on the papers, on the hardship claim, through December 31, 1951, was $919; is that correct?

A. Yes; in other words, included in the $26,000, in their breakdown of the $26,000 it included over $919 for engineering labor.

Q. That is on the working papers of the hardship claim?

A. Well, it is indicated as just one figure $26,000, and you would have to look at the transcript of the 381 job (132) to see how the buildup of the 26,000 was arrived at, to say in that buildup the $26,000 was made up of an amount of over $919 for the direct engineering labor.

Q. Well, did the $26,000 total show in the hardship claim papers?

A. Yes, because that was one of the schedules submitted by the contractor to show how the $1 million loss would be arrived at if the contract had been completed.

Q. Maybe you can show the judge ——

BY THE COURT:

Q. Let me ask: On the 381E was that attached to and made part of the hardship claim papers?

A. No.

Q. What was its status so far as you were concerned?

A. Well, as far as I was concerned, when I was performing the audit of Settlement No. 3 I was not aware of the hardship claim at the time—that is, the working papers—and I didn't know anything about the $26,000; I just saw that the company was putting in for approximately $80,000 in engineering labor which was made up of the 381E job and the 381. In other words, the total engineering from those two job numbers totaled over $80,000.

Q. When did you first become aware of that?

A. Of the 80,000?

(133) Q. Yes.

A. Oh, in connection with my audit of the Termination Settlement Proposal No. 3.

Q. You did have knowledge of 381E then?

A. Yes, yes, yes. Well, let me describe it this way. The 381E job was only shown or only indicated as engineering labor charged, and the charges started in about August of 1950 and went up through May of 1952, and the total charged for that period was approximately $77,000. In addition, there was just this 381 job which had the breakdown of various charges, direct charges for material, direct factory labor, and direct engineering labor, and for the entire period it showed a total of about $2300. Now, that $2300 added to the $77,000 which was shown just for 381E represented a total of $80,000 just for direct engineering labor.

THE COURT: I don't think I follow this witness. Does the jury understand this?

You haven't any chart or anything? This is awfully difficult to follow. I cannot follow it, and I am keeping notes.

* * * (N. T. pp. 133 and 134.)

(134) BY MR. FOGWELL:

Q. All right, to move along a little more rapidly, can you tell us, Mr. Grossman—I understand on October 7, 1953

that you and Mr. Goldenberg and Mr. Rubinroit had a conference; is that right?

A. That is right.

Q. That was where, sir?

A. At Espey Manufacturing.

(135) Q. And what was, briefly, the sum and substance of that conference?

A. Well, we felt we could not process the claim until we had additional information, and we asked Mr. Rubinroit for the engineering summary by jobs, monthly summaries by jobs, and also for all current and closed out jobs, in order to see if we could tie into some of the figures shown on the hardship claim exhibit which indicated the inventory of the various jobs as of December 31, 1951.

Mr. Rubinroit gave us this information, bringing out not all the sheets at one time but some sheets, and making several trips, and when we had gotten through recording this information we then asked Mr. Rubinroit how come that the engineering charged to the 381E job was not shown in the hardship claim, and he expressed a little surprise that these charges to 381E were not shown in the hardship claim. He then said that the 381E, the engineering charges, that the company knew it was going to be a loss contract and they decided to charge off this engineering, I believe quarterly, to cost of sales.

We then told Mr. Rubinroit that we could not finish processing the claim until he gave us a complete buildup of all jobs which made up this December 31 inventory which was submitted as part of the hardship claim, and also (136) information to support the cost of sales buildup, as we wanted to see, if he was writing off his engineering quarterly, how it would be reflected in the cost of sales. Mr. Rubinroit said that he didn't have the information readily available and would get in touch with us when that information was obtained.

* * * (N. T. pp. 136 to 139 inc.)

(139) CROSS-EXAMINATION.

BY MR. KOSSMAN:

Q. You made the point of talking about you interviewed three women working on another job, 437, right? And they (140) were working on a commercial project; right?

A. Interviewed one woman who said that two had assisted here.

Q. What has that to do with this case?

A. Well, that was possibly one of the reasons building up in my own mind as to why I particularly ——

Q. Don't tell us what was building up in your own mind. What has that to do with 381? Were there any charges of those three women on here? Yes or no?

A. No.

Q. Well, that is the answer. Next—by the way, were you told by any people to talk about this, about the commercial?

A. No.

Q. Just your own mind brought it out?

A. Right.

Q. When you were told that there was $70,000 of extra work, engineering work, and it was so indicated by 381E, you were satisfied at that stage of the game in reference to that contract that it was a proper charge; right?

A. Well, at the time those were the records to support the total $80,000 for engineering labor.

Q. What records to support? There were no records to support that?

(141) A. Well, you have the buildup of the engineering to 381E which totaled approximately 77,000 on a separate job sheet, and you have the $2314 from this other job sheet which was on 381.

Q. But you didn't see the time cards then; correct?

A. No; one of the men who had performed tests on that had determined that the cards indicated 381. In other words, I did not personally make any tests.

Q. How about the 381E?

A. Well, taking in both accounts.

Q. Taking in both. Tell me this: How long have you worked for the Government?

A. Close to four years.

Q. What did you do before that?

A. I was in public accounting.

Q. You were in accounting?

A. Yes.

Q. Now, you are here on behalf of the Government; correct?

A. Correct.

Q. You have talked over this case with the agents and assistant district attorney; correct?

A. Yes.

Q. Can you tell the jury on your oath whether actually there was seventy or eighty thousand worth of engineering (142) work done, or can't you, on Job 381?

A. From the records we worked from it indicated that that was the engineering figure.

Q. No, do you know? Forget about the records. Do you know whether actually people did work on this job that might be seventy or eighty thousand, or don't you know?

A. No, I don't know.

Q. You don't know. Now, on that charge of $2000 or $900 or whatever it was, back in 1951, when this accountant was not working there, do you know whether $900 worth of work was done there or $30,000 worth of work?

A. No.

Q. You do not; is that correct?

A. Right. Right.

Q. Now, you became suspicious, and rightly so. You became suspicious because you saw a figure of $2000 or $900, and then you saw seventy; correct?

A. Well, I didn't see that during the ——

Q. No, I mean afterwards.

THE COURT: Let the witness answer.

THE WITNESS: In other words, what the contractor had submitted to support the claim was taken from those two Jobs 381E and 381 which represented the total direct engineering labor submitted in the claim. Now, the (143) fact was, since no units had been shipped, I just felt that it might have been excessive, and that is how I answered when somebody said to me, How is the engineering?" I did not take any exception to it at the time because we were working from the contractor's records which supported that figure.

BY MR. KOSSMAN:

Q My thought is this. When you went back and walked around—I think you said it might have been Armistice Day or something of that type—and you said "I have got to check up on this hardship thing," and when you saw there was a figure of $900 or $2000 on the hardship claim for engineering, then you said, "Why I suspect fraud because they put two here and seventy there." Is that your mental process?

A No, no, because if we had suspected at the time ——

Q No, later—later, when you made the examination.

A Well yes, but I am just saying, when I looked at the Army Audit which was working papers and I noticed this discrepancy ——

Q Then you became suspicious?

A More so than before.

Q Yes, more so; all right.

A I had an additional basis.

Q To be suspicious, right. But the truth of the matter (144) is you don't know whether there was 50,000 worth of engineering done and the records were improperly handled, or $2000 done, or whether there was $2 worth of work done and $2000 written down?

A Well we cannot make that type of determination because we are working from their records and we would never have completed the audit on that basis.

Q. That is correct, but you used as a basis of fact that there were two different sets of figures to say that the second one must be wrong because it is higher; right?

A. No, no; that is why I arranged for this other appointment to have the contractor explain this discrepancy.

Q. Now, am I correct in saying you had a discussion with the defendant here, the accountant?

A. With reference to what?

Q. With reference to only one thing we are talking about, that is, engineering cost.

A. Be specific, and I can say yes or no.

Q. That is the only thing we are talking about?

A. Well, I was there to audit the entire claim, not just the engineering. It so happened that the engineering became the irregularity.

Q. Did you have a discussion with him about the engineering?

A. No.

145 Q. You never discussed the engineering with George, the defendant?

A. No, my findings were discussed with Mr. Rubinroit. For some reason he acted as the contractor's representative in discussing any findings with the auditor.

Q. Do you have any memorandum of any conversation that you might have had with Mr. George—did you write down anything anywhere? Do you have any notes?

A. Nothing specific.

Q. Did you read anything before you took the stand?

A. Yes.

Q. What?

A. I have just a copy of my own writeup of the report on evidence of suspected fraud.

Q. May I see that, please?

A. Surely.

Q. Don't you remember when he visited the Air Force Audit Office and talked to you and Goldenberg?

A. I believe that was on the 8th of October. I was in

the office. I saw Mr. Masters but I don't recall—I mean I believe that is the conversation was with Mr. Grubenberg.

Q. Well, are you sure it is possible—weren't you interested enough to listen to it?

A. No.

Q. You were not interested?

A. No.

Q. I mean, are you positive?

A. For the simple reason that if Mr. Grubenberg was discussing something I felt it was none of my business unless I was called upon to be a part to what was going on.

Q. Did you know what he came in to discuss?

A. Only from what Mr. Grubenberg had mentioned later to me.

Q. What did Mr. Grubenberg tell you?

A. That he was interested in seeing how this land was being developed, and I believe he said that if the engineering figures were something which we could not determine whether it is economical that we should sell it or not for consideration if the engineering figure was higher than figure.

Q. Didn't he tell you that he was satisfied as you do not have the facts or someone else send an engineer to determine whether this figure was correct, he subsequently did that to Grubenberg?

A. Possibly.

Q. Well, that is important. Let us think about it. I am not the one who 'possibly.' Now would you say yes or no? Think about it.

A. Well, I don't see the one or the other specifically to me.

Q. But to Grubenberg?

A. Yes, that is possibly correct, but why is that important? Why is that important?

Q. Well, you will forgive me, but I don't have to explain why it is important.

A. All right, sir.

Q. Did the defendant tell you at that particular time in the presence of—is Goldenberg your superior?

A. Yes.

Q. All right, did he tell you and your superior that he is willing to do anything to prove why he arrived at this figure, why that $2000 figure originally was wrong?

A. No. I don't recall that.

Q. You don't recall.

A. No.

Q. Is it possible?

A. Possible that ——

Q. That there was that conversation?

A. As I say, it is possible, but I do not recall that.

Q. Well, tell me this: A man comes in, he submits a $80,000 claim; right? Or whatever it is in round figures?

A. Well, why didn't he explain it while I was at the office if there was anything to be explained? I mean, I (148) was just given the records to audit the claim and there was no need for him to explain anything at that time.

Q. Did you ask for an explanation?

A. No.

Q. You were there two weeks?

A. Right. I worked from the contractor's records.

Q. Who had the cards? The cards were on the table for you to see; isn't that correct?

A. No, the cards were not on the table.

Q. You said the cards were on a table. Where were they? They were some place.

A. That particular week?

Q. The second week, after you got back, after lunch.

A. That didn't concern this particular job. That was just an independent floor check. I was interested in the contractor's recording of labor on jobs.

Q. You were shown a card by the Government, a time card written in, 381, total 40 hours, cost $125, Espey; it has the name Edward Robinson; right?

A. Correct.

Q. Do you know whether Robinson worked there those 40 hours?

A. No.

Q. Didn't you make inquiry?

(149) A. No, because we don't check every single card; we take possibly three or four months and check all the cards for that month. We make a selective test; not a specific examination.

Q. Didn't you think before you filed suspicion of fraud you should check up whether Robinson actually worked there?

A. Well, we would have to do that with something like 450 employees, and that is not our object.

Q. In other words, you make a quick decision based on how you feel at that particular moment; is that right?

A. No, I felt we had enough of a basis to say there was irregularity in the records.

Q. To say there was irregularity in the records?

A. Right.

Q. And you did not want to make a detailed, specific examination by actually finding out from the people who did the work with their hands whether they actually did that work; right?

A. Well, what would that indicate? In other words, how are we to determine? In other words, if we interviewed every employee and said, "How much time did you spend on this job?" Remember this is September of 1953, and the first charges for 381E start in August, 1950. I don't see how they can remember what they were working on at that (150) time.

Q. So therefore you really don't know whether the charge of $80,000 is a fair, correct estimate—let us put it that way—of the engineering time that was spent on this model that had been defective when it was submitted by this IT&T subsidiary, Federal Telephone & Telegraph.

A. Right.

Q. That is right?

A. Right.

Q. Now, I want to see this particular report. There are a lot of cards there that were charged with a job; right?

A. Right.

Q. Well, you did interview a specific fellow, Anthony Serta; right?

A. Right.

Q. And you asked which job he worked on for the previous week. He said he worked on three jobs, and that the recording of jobs is made by Mr. Baker in charge of production; right?

A. Right.

Q. Mr. Baker was then contacted and asked how he recorded that charge to the job when the supervisor works on three jobs. The answer was he knew how much time to charge each job; right?

A. Right. This is what I meant got out of my mind.

(151) Q. Here you have a card, specific card, Robinson, with a specific job number, the one that this man is being charged with; right?

A. Right.

Q. And why wouldn't you go to Robinson and say, "Did you do this work for the Government?" Here was a specific item.

A. Well ——

Q. And if Robinson would say, "I never did any work at all on this job," say it specifically to him?

A. Well, to use your approach, we would have to do that for the factory production labor too. In other words, when a contractor gets a Government contract and we make a system survey as to the type of contract system he has, we as accountants use his records in building up information to support a claim whether it be a price redetermination audit or a termination claim. In other words, that is our approach, and we make selective tests just like an outside public accounting firm does rather than look at every detailed transaction. They make selective tests; they look

into the internal control; and that is the approach we use. I don't think we would be performing a proper audit if we were to interview every employee and ask them which job they were working on. The contractor had approximately forty (152) jobs at the time, and I think that would be humanly impossible.

Q. Will you tell me this. Attached to this report is a letter, a copy of a memo by George Mastros; right? You are familiar with that?

A. Yes.

Q. And I will read that. I mean there is no question about that—he wrote that; right? Otherwise you would not have it?

A. Right. I was given that memorandum by Mr. Mastros.

Q. Now, this subject was Espey Manufacturing Company, evidence to suspect fraud, memo to S. M. Ross, Branch Chief, dated October 12, 1953. This is a letter that he wrote; right?

A. No, no; that letter was not addressed to Mr. Ross.

Q. It says, "Memo to."

A. Yes—well, that was given to, let us say, my chief, but actually Mr. Mastros made up my memorandum. It was just for his own—just for the company's use.

Q. Did he throw it in the wastepaper basket?

A. No, I believe he distributed it to the employees responsible.

Q. All right; I will read what he wrote up at that time after your visit. Where did you find, as you put it, carelessness in the handling of the records?

(153) MR. FOGWELL: Objected. That is not what he said.

BY MR. KOSSMAN:

Q. Well, did you find carelessness or didn't you in the handling of the records?

A. Yes, I was satisfied with the way they were handled.

Q. That is right. Now, this is the memorandum that the accountant wrote, the controller:

"Your attention is directed to the fact that it is of the utmost importance that time cards be allocated to correct job numbers. From those time cards this office is able to calculate the costs on particular jobs. The important reason for such calculation is to enable this office to intelligently prepare bids for new orders for the same or similar type equipment. Errors in allocation either way are a decided disadvantage to this company for the following reasons:

"First, if the labor is underestimated our company may secure new orders which necessarily are underestimated in price and therefore when received will result in loss to our company.

"Secondly, if labor is overestimated our bids for new orders will be necessarily too high and will (154) result in our not being considered for new orders.

"In either event any carelessness in allocating time cards will result in serious detriment to our organization. It is absolutely essential, therefore, that you pay particular attention to the allocation of time cards and that you pay very close and strict attention to this memorandum."

Signed George Mastros. That is correct?

A. That is right.

Q. He gave you that memorandum?

A. Right.

Q. Your next sentence after that is, "After the AF ——". that is Air Force accountant—"found these irregularities he informed the payroll clerk and then left the office. These findings they discussed with Mr. Ross and with Mr. Goldenberg; right?

A. Right.

Q. You said there was suspicion fraud and so made your return; correct?

A. No; you have to read the entire file there.

* * * (N. T. pp. 154 to 156 inc.)

(156) Q. Mr. Rubinroit, who was, I suppose, the chief auditor of the organization—you haven't reported—I will put it this way—that he was surprised that the amount shown on 381E job was not included in the hardship claim: correct?

A. Correct.

* * * (N. T. pp. 156 and 157.)

(157) BY MR. KOSSMAN:

Q. Didn't he tell you and your superior that he is perfectly willing to have a Government engineer who is familiar with this equipment evaluate the engineering requirement, and that he would abide by that decision whether it be right or wrong in allocating the $80,000?

A. I believe so ——

MR. KOSSMAN: That is all.

RE-DIRECT EXAMINATION.

BY MR. FOGWELL:

Q. When did he tell you he was willing to do that, before or after you suspected something wrong?

A. That was after. It was on October 8, 1953.

Q. When did he prepare this memorandum directing his employees to be careful about the time cards; before or after you made it clear you thought something was wrong?

A. Well, that was the day after I found the information.

Q. Mr. Kossman asked you if you knew if the Government had indicted any of the Pinsleys and or the Espey Manufacturing Company.

MR. KOSSMAN: I did not.

MR. FOGWELL: My recollection is ——

(158) MR. KOSSMAN: But you can ask him that question.

MR. FOGWELL: My recollection is that he asked whether the Pinsleys or Espey had been indicted, and I think you said no. My question to you now is, do you know whether the Pinsleys will or will not be indicted.

MR. KOSSMAN: Oh, come; I object to that question.

THE COURT: Objection sustained.

MR. KOSSMAN: Proof of the pudding ——

MR. FOGWELL: It certainly is.

MR. KOSSMAN: —is, they have not.

MR. FOGWELL: That is all I have.

RE-CROSS EXAMINATION.

BY MR. KOSSMAN:

Q. Wait, I want to ask you one more question based on termination. This was a termination of contract audit; right?

A. Right.

Q. Now I am reading from—this is put out by the Armed Services Procurement Regulation, and I am going to read Part 4 which states, "General principles applicable to the settlement of terminated fixed price contracts."

MR. FOGWELL: Did he say he was familiar with this?

(159) MR. KOSSMAN: He is familiar with it.

BY MR. KOSSMAN:

Q. Are you familiar with the Armed Service Procurement Regulation? Of course, that would be in settlement of price-fixed contracts.

A. Yes.

Q. Part 4, 8-4c, states as follows—then I will ask you a question based on it —— This part establishes the guiding principles and policies in connection with arriving at fair compensation from the settlement and termination of fixed-price contracts. The primary objective in negotiating a settlement is to agree on the amount of compensation to the contractor fairly and fully for the work done and the preparation made for the terminated portion of the contract with such allowance for profit thereon as is reasonable under the circumstances.

Now, isn't that part of the way you go about auditing?

A. Yes.

Q. Doesn't that principle guide you?

A. Right, right; that is one of the principles.

Q. Secondly: Fair compensation for termination is inherently a matter of judgment and therefore cannot be measured exactly.

(160) Is that correct? I am reading from the Bible, the book.

A. Well, that is not ——

Q. Fair compensation for termination is inherently a matter of judgment and therefore cannot be measured exactly.

Is that a fair statement of the principles that guide you in auditing a claim?

A. I think you would have to expand on that a little bit, because in some cases where, let us say, you may have a

termination and the contractor does not, let us say, record its costs on a part-cost basis and something was terminated, you would take the percentage of completion. See, in other words, there are various bases used, and that is why a certain judgment does enter into it at times; but just to read that statement by itself, I think it would be difficult for anybody to follow who was not familiar with the audit of a termination claim.

Q. Would you state the principles laid down by the Armed Services Procurement Regulation guided you in this matter?

A. Yes, but it also says "reasonableness of cost."

MR. FOGWELL: Wait. Let him finish.

THE COURT: Don't take anything out of context.

BY MR. KOSSMAN:

(161) Q. In a given case various methods may be equally appropriate for arriving at fair compensation. Differing amounts resulting from combination of method and sound judgment may also be regarded as compensation. The ability to apply business judgment as distinguished from accounting principles is at the heart of negotiating settlement.

Isn't that a correct principle when you come to audit a claim, for guidance?

A. That is right, but we do not negotiate; we just audit, and the contracting officer who reviews our report, which is of advisory nature, is the one who negotiates the actual settlement. He does not have to go along with our audit findings; he can use other principles.

From an audit standpoint we go strictly in accordance with what the contractor's records show to support the claim.

Q. The third and last principle that is standard is this:

Cost accounting data may provide guides for ascertaining

fair compensation, but are not rigid measures of it. Other types of data, criteria, or standards may furnish equally reliable guides to fair compensation. Settlement by agreement should be facilitated to the maximum extent feasible. The amount of record keeping, reporting and accounting in connection with settlement of termination (162) claims will be reduced to the minimum compatible with reasonable protection of the public interest.

Is that a true statement of the philosophy that guides you and other accountants in handling this matter?

A. Yes, but that is a very general statement, I would say.

Q. Therefore, when Mr. Mastros came to the conclusion that an engineering fee should be 2 or 3 per cent of a contract that ran into $3 million, and the overhead which normally follows is a hundred per cent, would you say that he was doing something inconsistent with his own judgment based on those principles?

A. Well, if that was his judgment, I would question it.

Q. You would question it?

A. Yes.

Q. You would have a different opinion; is that right?

A. Well, in other words, it is not normal—at least from the claims that I have audited—for the accountant to make that determination, because I don't see how he is better qualified than, let us say, an engineer to make that determination, No. 1.

No. 2, the fact that Mastros started at a later date and these costs for 381E started in August of (163) 1950, I don't see how he would know who was working on what a year before he started with the firm, and I think to use that type of determination might be considered very arbitrary. I mean, to us it certainly is not a method which we would feel was proper.

Q. But he was perfectly willing to have an engineer of the Army make an examination to back him up in this judgment; is that correct?

A. Well ——

Q. I am talking about just this particular item, not the million of dollars on other contracts that he has nothing to do with. He was willing; right?

A. Yes.

Q. He is a graduate accountant, from New York University; is that correct?

A. That is true, but I don't think that qualifies him to determine that.

Q. But does he have such knowledge of accounting procedure as would?

A. Yes.

Q. He worked previously for another outfit, an engineering outfit?

A. It was not an engineering firm, sir. I mean, you emphasize that.

(164) Q. It was not? Oh, I am told it is an engineering firm.

A. Well, all right; I know the name of the firm and I know they do production work, too. It is not just engineering.

Q. Now, would you change your opinion of his judgment being arbitrary if you knew that he was present at a hearing where the president or the treasurer or the vice-president of the company said, "We had a lot of engineering cost on this model that was submitted, because it was a defective model"? Do you think that he should become alerted to the possibility that there is more engineering cost to be prescribed to a particular job than $900?

A. Well, as I said, I did not get into the hardship claim until a later date, but in reading over the contract of settlement, the fact that there were Government delays in furnishing proper drawings and the models, that information precluded possibly engineers working on this pre-production model.

Q. No, no, you misunderstand me. A wrong model was submitted, wrong blueprints were submitted; engineers' testimony at the hearing was that there had to be tremen-

dous engineering work done in order to make it work; it did not work when they got it: Now, would that make you feel that $900 was too little?

A. I cannot answer that because it was because of these (165) Government delays in furnishing the proper drawings and models which made the contractor go into a much later period and the prices of material and labor had gone up, and that was the basis for the hardship claim. They had to show that delay.

Q. You have attacked this man's judgment; you have said it was arbitrary, what he did; right?

A. Yes, according to what we would consider a proper determination for audit purposes.

Q. You're the accountant. You have left the Government. You are working for Mr. Espey. You are in his position; right? You are present at the hearing. You hear the boss, Morris Pinsley, say: "We have well over $400,000 in cash invested in the job not including engineering time which we had to put in in order to get the thing to a position where we accomplished the job without the Government's drawing. We can produce the thing for the Signal Corps.".

Do you think that you would feel there was something wrong in having $900? Is that such an arbitrary action? Or wouldn't you think that the $900 figure was wrong?

A. Well, why wasn't that information, let us say, submitted for the hardship claim? I think that would have been very important. In other words, that engineering alone, the labor and overhead was $150,000 compared to $26,000 (166) which were the costs incurred as of the hardship claim.

Q. When was the hardship claim performed? September 4, 1952; right? The hearing? When was the hardship claim actually made?

A. Yes, September.

Q. That was the hearing; right?

A. Right.

Q. But there was previous correspondence; right?

A. Right.

Q. When was he hired?

A. I believe around August, 1952.

Q. How could he at that time have the ability—put yourself in his position—how would you be able to figure it out exactly?

A. I don't think I could.

Q. That is the answer?

A. If I had to build up the labor information going back to August of 1950.

Q. Well, is it your complaint that because they put in $900 in the hardship claim that there is something wrong, even though it should have been $20,000 or $30,000 or $50,000? I mean, are you mad because there is a smaller amount there?

A. I don't know what the implication might be, but that contract was a straight fixed-price contract which means (167) that it was not subject to any audit, and if it is—I am just saying—to the contractor's advantage to charge less to that job regardless, they would be getting a straight fixed price. Now, if when it is terminated they have to show their costs incurred, and they say, "Well, we made a mistake in the original charging," I don't know; it just seems that there was a lot of labor involved which—in other words, there were a lot of Government contracts there, forty or fifty jobs—if you were going to pick out a single contract you would have to go individually to other contracts and do something about them.

Q. But, of course, no one knew this was going to be terminated; correct?

A. Right.

Q. And if this had not been terminated it might not have made any difference if they put in two or three million dollars for engineering. What difference does it make? Right?

A. Right.

Q. It was only when their termination proposal had to be submitted that it required you as the accountant to make your examination to find out actually how much engineering time; correct?

A. Right.

(168) Q. Well, are you prepared to say that he took these figures out of heaven, that he faked this thing, if he used 3 per cent or a 3 per cent basis, brought this out of the air? In other words, that is a foolish way, according to your way, to do it?

A. Definitely.

Q. Have other accountants used the percentage basis to figure it out, to prevent detailed study?

A. Not when they have labor records to support the claim.

Q. But suppose the labor records were sloppy and had to be corrected in order to bring in the supporting data?

A. As I say, this case was the exception rather than the rule. It is not the way it was done normally. In other words, the contractor's system was to charge direct labor, factory production and engineering to jobs based on the job cards which were the source information of whatever was paid out monthly. Those were the charges to the jobs.

Q. You were not satisfied with the system in that company, were you, when you came there?

A. Well, I ——

Q. The way they were running things?

A. Well, can you be specific?

Q. Well, you be specific.

A. I mean, I didn't like the atmosphere there, if that (169) is what you mean.

Q. The method of charging time—you weren't satisfied with the system?

A. Well, it had been approved previously, but I wasn't entirely satisfied. I felt that as far as engineering it might have been a little less because when a man charges his time to a job, possibly an engineer, maybe he should have described the type of work he did.

Q. All right, now, I want to ask you this question, and it is very important. Mr. Mastros stated, and told you—well, it is a matter of record—that the percentage of direct engineering cost to billings for the year ending 1950 was 3½ per cent; 1951 was 3 per cent; 1952, 2 per cent. Now, did you check up? Is that true?

A. I never knew about that.

Q. Well, it is a matter of record.

A. Yes, but I didn't know it at the time. I was just working from the information supporting the claim. I didn't know that that was Mr. Mastros' method.

Q. All right, but as a practical proposition, you are now the accountant in his position—I hope you are never in this exact position that he was back in 1953—but you have a basis when you are submitting a claim with your employer that the engineering business had been 2 or 3 per cent of (170) the contract. Would that be such an arbitrary, stupid action to you to figure 2 or 3 per cent on this one? Is that such arbitrary action?

I may be wrong. It may be careless. It may be right. But is it so arbitrary? Is the only man in the country who would have done that?

MR. FOGWELL: Objected to, sir.

MR. KOSSMAN: Well, he says it is arbitrary.

THE COURT: Is that in the record. Are you reading from the Pentagon hearing, that 2 and 3 per cent?

MR. KOSSMAN: No, but that is a matter of record that they actually have.

THE COURT: What record?

MR. KOSSMAN: The actual record the Government

has of previous contracts that use 2 or 3 per cent. I make that statement; the Government has the records.

MR. FOGWELL: I know nothing about it.

THE WITNESS: Not to my knowledge.

BY MR. KOSSMAN:

Q. What is that?

A. Not to my knowledge.

Q. You don't know whether it is true or not?

A. No, when I came to audit the claim I was given the job sheets supporting the engineering labor on 381E and 381. (171) We made selective tests of job cards supporting the particular months. We didn't know that the controller was using a percentage method to pick up this engineering labor.

Q. I am giving you a copy of what was given to the Government ——

THE DEFENDANT: Separately.

Q. (Continued.) Separately—but these are all together

(Tabulation marked Exhibit D-3.)

Q. Now, here is Espey Manufacturing Company for the years 1950, '51, '52, '53.

MR. FOGWELL: I think you ought to ask him, Mr. Kossman, with Judge Ganey's permission, whether he knows what that is. If he doesn't, I object to its use. I have never seen it before. I don't know what it is.

MR. KOSSMAN: Well, look in your records.

MR. FOGWELL: I have never seen it before, Mr. Kossman.

BY MR. KOSSMAN:

Q. Are you familiar with the fact ——

MR. FOGWELL: Let him see it.

MR. KOSSMAN: Oh, no, no.

BY MR. KOSSMAN:

Q. Are you familiar with the fact that in 1950 there were billings of $2 million to Espey Manufacturing Company. (172) Do you have any idea? —$2,714,000?

A. Is that the sales figure?

Q. Yes, it says "Billings" here.

A. No.

Q. Is it around right or not?

A. It may be. I am more familiar with the later sales figure.

Q. Take 1951—are you familiar in 1951 that there were billings of $5,125,000?

A. That sounds approximately correct.

Q. All right, I am telling you as a fact that 3 per cent direct engineering labor was $145,000, which amounts to 3 per cent of billings. Now, do you know whether it is true or not? I am telling you it is, but ——

A. Why base it on sales? No shipments were made on our contract. Why take that percentage on the sales figure? Under these sales we don't have any billings. What kind of relationship has that?

Q. I am asking you if you were the accountant and you had this as a basis for direct engineering labor would that possibly guide you if you had a contract involving 3½ million or 4 million dollars?

A. No.

Q. What is that? That wouldn't guide you?

(173) A. No.

Q. Is it possible other people could be guided or use that as a measure?

A. There is a possibility.

Q. After all, this was only an interim settlement proposal; is that correct? There was no check drawn on the treasurer of the United States. It was subject to be argued pro and con; right? You could accept it or reject it or divide or multiply by 2; right?

A. No.

Q. What do you mean "No"?

A. It doesn't mean that a contractor can supply any type of information and then we have to go in by devious means to make some determination and then have the contracting officer then negotiate a settlement. In other words, it is not quite as bad as that. In other words, the contractor before he even gets a firm contract has to have an adequate cost accounting system. We make that survey initially.

Q. All right.

A. Then we use those records as a basis to check out a claim.

Q. Now, there are certain areas from what you are reading where they do enter into negotiation?

A. Now, was the contractor using ingenuity in performing (174) the contract? Was he meeting his delivery schedule on time? Those are certain factors that are considered at the negotiation, not some of these audit determinations which we make, but the contracting officer usually goes along with us if it seems to be a proper determination.

Q. You have made a lot of audits, haven't you?

A. Yes.

Q. A hundred?

A. Approximately.

Q. Have you O. K.'d a hundred per cent of the audit set-

tlement proposals that individual contractors have presented?

A. No.

Q. Have you knocked them down, eliminated the overhead, and things of that sort?

A. Yes, certain costs, just as I did on this claim on the other items which I discussed with Mr. Rubinroit. In other words, not this particular item, but there were certain adjustments made to overhead account, certain entertainment expenses, bonuses, in other words, certain costs which we questioned in accordance with Section 8 which you were reading from before.

Q. Weren't you holding up the processing of this claim, and by you I mean your office, because of this engineering (175) labor thing? Right?

A. Principally, yes.

Q. Your boss said that he had no right to put down the hundred per cent for engineering overhead; is that right?

A. No.

Q. There was no discussion about it? After all it was 80,000 labor, but it became 160,000 as ——

A. Yes, but the overhead, the engineering overhead, is determined on a different basis. In other words, you have your total engineering labor as the base; you merely divide that figure into the total engineering overhead pool and you come up with a rate. Let us say it is a hundred per cent. Now, whatever direct labor they are putting in for engineering, you merely apply that percentage of the direct labor.

Q. In other words, if there was $80,000 worth of labor you would set up a rate and add another $80,000 for overhead?

A. Yes.

Q. No question about that?

A. Right; the overhead follows the direct labor.

Q. Now, were you present when Goldenberg argued with Rubinroit about the theory of establishing the general ad-

ministrative rates on the cost of sales basis versus the (176) sales basis?

A. No.

* * * (N. T. p. 176.)

BY MR. KOSSMAN:

Q. At any rate, this particular claim for $80,000. the amended claim, was filed in which the claim for engineering was withdrawn, but not by the accountant; is that correct? Do you know?

A. I don't know.

Q. You don't know?

A. Because I didn't go into the later amended claim.

Q. You don't know whether the claim was actually withdrawn or not?

A. Well, I know it was, and I know that the amount of engineering which was submitted on the amended claim was approximately $2314.

Q. But he did not file the amended claim. Did you know that? Well, that is a matter of record.

A. Yes. I am not sure, but if you tell me, I believe it.

Q. And do you know whether as a matter of fact he still (178) insists to this day and has so told the Government that his method of computation is correct? Do you know that?

A. I don't know.

MR. KOSSMAN: All right, that is all.

* * * (N. T. 178 to 188 inc.)

(188) BY THE COURT:

Q. In other words, the 381E—I don't know whether that paralleled 381—did you examine the cost sheets of 381E?

A. Yes.

Q. Did they substantiate the amount?

A. Yes. Yes, we had—in other words, they used the exact same type of job cost sheet designated as 381E and it showed an engineering labor charge by month, and we made selective tests of those amounts to the actual job cards for certain particular months.

Q. Well, would you say that 381E is correct in accounting practice?

A. From what I had seen at the time, yes. In other words, I had no reason to question it until I was able to compare it to the same cutoff period which the Army Audit Agency working papers showed.

(189) Q. Let me ask you this, did 381E, that 70,000, include the 919.59?

A. No, no. In other words ——

Q. You found no comparable item to 919.59 in the 381E 70,000?

A. No, that was charged to 381. In other words, the 381E, of course, was ——

Q. Was it additional to it?

A. Yes, it was designated as "E" standing for engineering.

Q. And was additional to 381?

A. Correct.

Q. Well now, if that is correct, if 381E is correct, where is the alleged fraud in the presentation?

A. Well, taking the same cutoff period up through December 31, 1951, which the Army auditors had taken as their basis to support the $26,000 which was included in the hardship claim, the same comparable cutoff period December 31, 1951, taken from 381E showed this additional $72,000, say from August, 1950, up through December 31, 1951, which did not exist at the time the Army Audit Agency auditor performed his audit in connection with the hardship claim. It is for the same period. In other words,

he only showed up through December 31, $919 and that was right from 381? He said that he wasn't ——

(190) Q. Well, maybe it was, but if you checked it out and found out it was right in accounting practice, couldn't it have been an error of judgment or something else? What makes it a fraudulent claim?

A. Well, the fact that ——

Q. Couldn't it have been supplemental to the $919 or the $2300?

A. Well, then, it must have been changed after the Army Audit Agency had performed its audit, because if that was known at the time that would have been submitted as part of the hardship claim.

Q. In other words, you say that it was not submitted as part of the hardship claim, and that they would have added that on to—well, it wouldn't have boosted their chances of getting anything additional, but it was not a true explanation of the situation as it obtained at the time of the presentation of the hardship claim.

A. Right. In other words, they were giving the actual costs incurred as of December 31, 1951, which showed this amount of $26,000 which was made up of $919 of engineering. Now, if they had the 381E job at the time and they had for that cutoff period December 31, 1951, an additional amount of engineering of $72,000, that would, I think ——

Q. Well, if it checks out, though, doesn't that show it (191) was a genuine claim? Did you say you checked it out?

A. Yes, but it didn't ——

Q. If it checked out, could it just be that they didn't present it?

A. Well, where was it recorded, then?

In other words, where was this engineering under 381E?

Where would that have been at that time when this hardship claim was audited? In other words, that was comparable to the $919 which was shown.

Q. That is right.

A That was recorded at the time.

Q. However, when you come back in 1953 and check, you saw 381E and checked it out, and you say that is all right. The fact that they had not presented the hardship claim —would you say that that was dispositive or conclusive of the fact that it was not in existence at the time?

A. Yes, based on the way the contractor records its charges to various jobs monthly, and the fact that I made this additional check by finding this transcript, engineering transcript, for September, 1951, and saw on these nine jobs the same job numbers where there were differences—differences—and those differences added up to the exact amount which was put in under my claim for the month of (192) September, 1951.

Q. Did any of the statements this defendant signed—did he to you hold himself out as approving of these? To you? I mean this defendant; not the company, or Rubinroit, or ——

A. Well, it is a difficult question in that I would say most of our work is done through a liaison man, usually the controller, so that if I needed any records to look into they were given to me by Mr. Mastros, so that, in other words, most of my activities were channelled through him.

Q. Well, did you say to him. Here, what is this, boosted up sixty-eight or some odd thousand dollars? What is wrong with this? Did you ever say that to him. What is wrong with this?

A. No, because I didn't know about that disparity till I had completed my audit and left the office, and then got the permission to go to the Army Audit Agency to review their working papers in connection with the hardship claim.

Q. You never went back to him?

A. No, no, except that we did make an appointment through Mr. Mastros to see Mr. Rubinroit and try to get additional information to support the claim. That is when we went back ——

THE COURT: All right, Mr. Fogwell, you may (193) go on with this as far as you want, because my inquiry ——

MR. FOGWELL: The witness next after this, the two next, did ask the defendant what Your Honor has now asked this witness, and I think I will be able to throw a lot of light on that.

THE COURT: I don't want to throw this open, but does any juror want to make some inquiry?

Mr. Grossman is familiar with this whole transaction. If there is any particular question anybody wants to ask before he leaves the stand, I am sure he will be happy to try to answer it. I have tried to bring it down to get a fair degree of comprehension of it.

Has anybody anything to ask the witness? He will be very happy to answer.

JUROR NO. 10: What was the $70,000 that you referred to? Was that something that occurred at a later date? And did that include some of the other figures, the 26,000 and possibly the 900 sum that was included in the 26,000? What was that 70,000 which you referred to?

THE WITNESS: Well, I think I might, without getting too detailed ——

JUROR NO. 10: Would it be too detailed? I don't want to waste the time of the Court if it is.

THE COURT: That is a good inquiry.

(194) THE WITNESS: To go back on this, the contractor has what they call a job order cost system.

JUROR NO. 10: Yes, sir.

THE WITNESS: In that they assign certain numbers, certain job numbers, to a contract, so that any costs under that particular contract are identified by this job number. This contract was identified by Job No. 381. Now, the total cost incurred as of December 31, 1951, to Job No. 381 amounted to $26,000 in total. Now, that was made up of any direct material going into the job, any direct labor—that would be factory labor—and any direct engineering labor and other direct charges and overhead. Now, those individual categories amounted to the $26,000 as of December 31, 1951.

Now, the contractor had shown that figure in its hardship claim, because when the hardship claim was filed in February, 1952, let us say, which was a month or two after that cutoff period, they had to work first with what was incurred, that is, how much they had incurred on this job to date, as of December 31. Then from that cutoff period they had to project what the total cost would be to complete the contract, and by showing this loss compared to the contract price that was their basis for submission of the hardship claim.

(195) Now, when I came in to perform this audit on the termination or as the termination took place February 19, 1953, that was the date of termination, that was when the Government by telegram told Espey that this contract is being terminated at the convenience of the Government

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JUROR NO. 10: That was exactly a year later?

THE WITNESS: Yes.

JUROR NO. 10: Then the first time ——

THE WITNESS: Well, I wasn't there the first time on the hardship claim.

JUROR NO. 10: I see.

THE WITNESS: This actually is the first time I got into this claim when I was assigned to audit this termination proposal. Included in this claim was an amount of engineering of $80,000 and the 80,000 was supported not only by Job No. 381 but by another job number called 381E. Now, when I went down to—well, the 381E had—it was just direct labor engineering, and it had up through December 31—well, let us say the charges were built up monthly starting with August of 1950 and went up through December 31, 1951. In other words, that was the same cut-off period through which the Army Auditing Agency auditor had gone in his hardship claim. That was the only cost incurred at the time of that audit.

(196) Now, I noticed that the 381E job for the same cut-off period had a total of $72,000 in engineering labor when for the same period when the previous audit was made they only showed $919.

Now, following through subsequent to that; in other words, any additional charges, on 381E, they had built up additional amounts coming up to a total of $77,000, and then under 381 they had $919 as of December 31, 1951, and then some additional monthly amounts which brought it up to $2314. Those two totals made up the $80,000 of total engineering which was put in under this particular claim.

JUROR NO. 10: I see.

THE WITNESS: So, in other words, when I went down to the Army and looked at their working papers and I saw as of December 31, 1951, when they made up a transcript of the job costs on 381 they only showed an amount for engineering of $919, and here I had under 381E an additional amount of $72,000 in addition to the 919, and I wondered why, if this amount existed at the time of the hard-

ship claim, why wasn't that shown under the hardship claim under 381E, because it was a substantial amount.

JUROR NO. 10: Thank you.

(197) THE WITNESS: Does that clear it up a little?

JUROR NO. 10: Yes, sir.

THE COURT: Mr. Fogwell, do you want to go into more detail?

BY MR. FOGWELL:

Q. Can you point out in the third settlement proposal, so that the jury may see it later, these figures in question? Tell us what these figures are? I am referring now G-8. Tell us what the figure under engineering costs, labor, $80,096.84 ——

THE COURT: Let us identify that as the No. 3 Terminal Settlement.

MR. FOGWELL: Yes, sir; it is G-8.

THE COURT: All right; that is the Termination Settlement, not the Hardship Claim. All right.

THE WITNESS: On the top sheet of the appraisal you have under No. 8 item of other costs a total of $231,072.74, and that particular amount is made up of several items. They have a breakdown, a detailed explanation, of items included in Schedule B, other costs of settlement proposal on terminated portion of contract, and one of the items is designated under engineering costs, underlined, and you have expended material $9,098.86, and then labor $80,096.84,

and the engineering overhead coming up with the total of 196 $182,000, but a particular reference is made to the labor of $80,096.84 which was made up of the $77,000 charged to Job 381E and the balance of $2814 charged to just 381.

BY MR. FOGWELL

Q. Now, would you take Mr. Homan's yellow pencil if you can, and just make a yellow arrow to that $80,096 item, et cetera.

A. Witness complies.

Q. Now, focus your mind on this if you can. G-8, which is the third settlement proposal, which you have in your hand, and which you have been dealing with the last minute or so—you tell us that in that, which was the proposed or third proposed settlement agreement, they asked for some $80,000 worth of engineering labor, correct?

A. Correct.

Q. Now, to what date do they say that went?

A. Up through May of 1952.

* * * N. T. pp. 198 to 205 inc. * * *

205 Q. Do you know when and how Job 381E was set up?

A. Well, I just thought it was just another job at the time I was performing the audit. I saw 381 and I saw 381E. I did think it was a little unusual because this was the only job where the contractor used an auxiliary job designated by an E. In other words, all the other jobs just had one job number and there wasn't anything similar to this.

Q. Are you able to say whether Job 381E was set up before or after September, 1951?

A. Well, I would have to infer that it was set up after 1951.

Q. Do you know whether any of these labor summaries

—whether you are talking about the daily, weekly or monthly or yearly ones, if there were such—were originally made up or whether they were rewritten?

A. Well, I ——

Q. You don't know? Were there any adjustments made on these labor summaries in connection with any other jobs, if you know?

(206) A. I don't know.

Q. Mr. Kossman asked you, in effect, prior to your going down to the Army whether you had any reason per se to question this $80,000 labor item. I think you said yes; isn't that right?

A. Well, I wasn't happy with it, but from the tests we made—I mean I would just have to accept that figure from an audit standpoint?

* * * (N. T. pp. 206 to 208 inc.)

(208) BY MR. KOSSMAN:

Q. Didn't Mr. Mastros tell you, Mr. Grossman, in justification of this seventy or eighty thousand against the nine hundred that the reason that was the wrong figure was that the company had charged that to engineering cost each year?

A. No, not at the time we performed this audit.

Q. Well, when did he tell it to you?

A. I don't believe Mr. Mastros ever mentioned that to (209) us.

Q. Well now, you say you don't believe; I want you to put yourself back to 1953. Did he have a discussion with you and Goldenberg? Right?

THE COURT: When in 1953?

MR. KOSSMAN: In October, 1953. You said yes?

THE WITNESS: Not with me. I believe with Mr. Goldenberg. He came to the office on October 8, 1953. That was the day after we had the discussion with Mr. Rubinroit asking for the additional records.

BY MR. KOSSMAN:

Q. Well, did you know at that time—let us put it that way—if he said the amount was $900 on the hardship claim or $2000?

A. I did not discuss that with Mr. Mastros, and I say I was not with Mr. Mastros and Mr. Goldenberg when they were having this other discussion.

Q. Well, did Goldenberg tell you that he spoke to Mastros and he gave an explanation for why he raised it to $75,000 or $80,000?

A. No, I am not familiar with that.

Q. Well, you testified earlier that Goldenberg did have a discussion with you.

A. No, not on that.

(210) Q. Well, what did he tell you this man said?

A. The only thing I recall is that I was told that Mr. Mastros mentioned that if the only thing that is holding up this claim is engineering labor, why don't we set it out for the contractor's administrative determination and let him decide as to how much is reasonable.

Q. How long was Mastros ——

THE COURT: Fix the date of that, first. When was that?

THE WITNESS: I believe it was October 8, 1953, the day after we discussed certain additional information with Mr. Rubinroit at Espey, and then the next day, October 8, which was a Thursday, Mr. Mastros had come to the office, our office, and I believe his discussions were with Mr. Goldenberg, and I saw Mr. Mastros; I was sitting at another desk, and I just stayed where I was.

BY MR. KOSSMAN:

Q. How far away was your desk from where this discussion was going on?

A. Possibly from where Mr. Goldenberg is sitting right now to where I am sitting here. Mr. Goldenberg is the gentleman in the brown suit.

Q. You did not come over at all? Is it possible?

A. Possibly later. I say, I don't recall too well.

(211) Q. Now, tell me this: How long was he there?

A. I believe up until ——

Q. No, how long in time? A minute, an hour, a half hour?

A. Well, I don't know if he came in strictly to see us. I believe he had some other ——

Q. How long was he with Goldenberg?

A. Maybe possibly a half hour or so. I know we walked out together.

Q. But you all three walked out together?

A. Yes, yes.

Q. Where did you walk to?

A. Just outside, and we left as we got outside the building.

Q. Now, this paper—of course, you would say that Pinsley knew there was a hardship claim, or that Espey or someone knew they had filed a hardship claim for $900; right?

A. Yes.

Q. Somebody knew about that; right?

A. Right.

Q. Now, you are the accountant, right, for the company—let make believe. You saw the item $900. In your opinion it is an incorrect figure. It should be 70,000. Would you (212) change it or wouldn't you?

A. Well, why would I only want to pick on one job? How about all the other jobs?

Q. We are talking about this one particular job that was terminated.

A. Well, the fact that it had been going on—in other words, they got the contract in June of 1950 and the hardship claim was filed February, 1952, it seems to me that was certainly enough of a period in which to make that determination if you didn't like the way the charges were being accumulated.

Q. Yes, but you came to work for the company in May or June of 1952?

A. Well, I didn't know what was going on before that period.

Q. Well now, when you came back and took a look and you saw $900 and you thought it should be $70,000 based on the total amount of the contract; would you make that change, or is there something in the law that prevents you from changing it?

A. Well, since you told me this morning what basis was used, percentage of sales, I certainly don't think I would use that basis.

Q. You would not use that basis; correct?

(213) A. Right.

Q. You would not use that basis, but if it was wrong on another basis would you make the change? Is there something sacred about putting down a figure, that it cannot be changed?

A. Well, I would have to be faced with that situation and then see what determination I would make.

THE COURT: I don't think his judgment is a criterion. What he would do is not conclusive of it. He might do something that is not what good accounting practice would indicate.

MR. KOSSMAN: If the Court please.

THE COURT: I would not ask him for his personal judgment.

BY MR. KOSSMAN:

Q. Let us put it this way: We are dealing with what actually happened. You don't know whether there was $50,000 worth of work done during that period, engineering work, or $10,000 or $20,000?

THE COURT: I think he has told us that before; he didn't know.

BY MR. KOSSMAN:

Q. You only take the position that because $900 was written off you don't want to go any further; is that (214) correct?

A. Well, what other basis could I use when the contractor has certain records to support his claim, and if there was a disregard of records, and if the interviewed employees ——

THE COURT: We have gone into that. I think he has answered that.

BY MR. KOSSMAN:

Q. The next problem involved—you say the man said he only spent $23,000 on the contract up to 1951; is that correct?

A. $26,000.

Q. $26,000. Are you familiar that at the hearing in September, 1952, that he said, and I am reading from Page 35, that back in August and September of 1951—that is Morris Pinsley talking about this particular contract—"We had expended nominal amounts of money on the contract, let us say $50,000. At that point I felt legally justified in saying to the Government 'You are in default. We consider this contract canceled. Pay us for what we did.' We proceeded

in good faith with the Signal Corps. We have had many discussions with the Chief Signal Office and we have gone over and beyond what the ordinary prudent attorney would have done. We have put in the engineering time in the unit."

Skipping the next paragraph: "So we have pro- (215) ceeded on pretty good faith in this situation, putting practically our entire capital which we had in cash invested in this job. We have well over $400,000 in cash invested in the job, not including the engineering time which we had to put in in order to get the thing to a position where we accomplished the job without the Government's drawings. We can produce the thing for the Signal Corps."

Now, how does that reconcile with the fact that you say it is $23,000? Because on the paper he said it was $23,000? Is that right?

A. Yes.

Q. $26,000?

A. Well, if there was this additional $50,000, how would it be shown?

Q. I don't know how it would be shown. I am only telling you what the man said.

A. Well, what makes you think that his statement was correct?

Q. Well, have you done anything about it?

A. I didn't go into to audit the hardship claim.

Q. Have you done anything about any other thing but this engineering claim for $80,000? Any other item in question?

A. Yes; but nothing unusual.

Q. Nothing unusual?

(216) A. The type of findings which we would usually come up with.

Q. You don't question the $35,000 salary, do you?

A. No.

Q. And the Cadillac and the expenses?

A. No, I would like to point out that the salaries which

the officers were getting were in accordance with the war loan agreement, and they were considered reasonable for the type of company and the type of work they were doing; secondly, if they were driving a Cadillac, I don't think that really has any bearing on this. In other words, I did examine certain overhead expenses; I did question certain types of expenses—entertainment, certain travel expenses which weren't substantiated, and we did come across where the company paid for the Cadillac and it was put in as part of overhead. In other words, they can drive any car they like, but I don't see that that is so important.

Q. The company car—that is not important?

A. If it is used for business it is proper.

Q. This claim, therefore—this million dollar claim, the only thing that really meant something as far as you were concerned was this engineering item of $80,000 for engineering labor; right?

A. Right.

(217) Q. That was the thing that stuck out like a sore thumb?

A. Right.

Q. Not because you didn't know whether $80,000 had been actually used or not, but because there was a previous hardship of $2000; right?

A. Right.

Q. Right. Of course.

A. In other words, there was a difference in what was being presented for a comparable period.

Q. Now; would you have felt differently if you had known that Mr. Pinsley had spent $400,000 in cash, not $23,000, and was talking about not including engineering time? Isn't that ridiculous, $900? $900 against $23,000 might be all right, but when there is a $400,000 item don't you think that there should have been a greater allowance?

A. Well, you tell me this company ——

MR. FOGWELL: Again, I don't like to be captious, but I don't think there is anything in the record that shows Morris Pinsley said that. If Mr. Kossman wants to subpoena him that is the best way to do it.

MR. KOSSMAN: I object to the district attorney telling me to subpoena Morris Pinsley when he knows he has interviewed Morris Pinsley—am I right—when he has interviewed Morris Pinsley directly and the (218) Government can bring in anybody they want to. He doesn't have to tell me to subpoena people.

I am asking him—he has said that $80,000 is out of line for engineering work, because there was only $23,000 work. I asked him, suppose $400,000 in cash had been spent; would an accountant be justified in figuring based on this statement ——

MR. FOGWELL: Now, sir ——

THE COURT: Objection sustained.

BY MR. KOSSMAN:

Q. Now, you say there was no other contract with the letter E after it; right?

A. Right.

Q. And it had exactly this particular number; right?

A. Right.

Q. Did you ask him what the E stood for? What was the number 381? What was under 381E? Didn't you ask him?

A. I said I wasn't involved directly with the audit of the labor; I say one of my assistants did that.

Q. Oh, one of your assistants asked him?

A. He might have asked him, but I was satisfied this is what the contractor had submitted to support the $80,000. Now, if we check on the actual time cards and we satisfy ourselves that those are correct charges as presented we (219) feel we don't have any reason to ——

Q. Did you make a spot check of the time cards?

A. Yes.

Q. And you were satisfied; right?

A. Yes.

Q. Didn't he tell you, because there was a hardship—I believe you talked to ——

A. No, he didn't tell me about the hardship plan.

Q. I haven't said he told you about the hardship plan: Didn't he tell you that the reason for this E, for adding the $70,000 or $80,000, for having the time cards corrected, he was going back to 1951 so as to accurately reflect what had taken place in fact?

A. No.

Q. That the $900 was wrong?

A. No.

Q. He did not tell it to you?

A. No.

Q. Did he tell it to Goldenberg?

A. I don't know.

Q. Did he tell it to anybody? Do you know?

A. I don't know, but he didn't tell it to me.

Q. He was perfectly willing to have an Army engineer check up on what he had done; is that correct?

(220) A. From what Mr. Goldenberg told me, yes.

THE COURT: Is that all, Mr. Kossman?

MR. KOSSMAN: That is all.

IRVING GOLDENBERG, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

BY MR. FOGWELL:

Q. By whom are you employed?

A. I am employed by the Auditor General of the U. S. Air Force.

Q. And in what capacity?

A. Well, at the present time I am a supervisor for the district office. At the time this claim was in the process of audit I was reviewer for the New York Branch Office of the Auditor General.

Q. In your capacity as an Air Force auditor did you have occasion to visit the Espey Manufacturing Company in about October, 1953?

A. Yes, I did.

Q. When did you first visit the firm?

A. Well, the exact date, I believe, is October 8, and the circumstances of my visit were explained by Mr. Grossman. I will review it briefly.

(221) THE COURT: October 8, 1953.

THE WITNESS: I think it was October 8, 1953.

Mr. Grossman was assigned to perform the audit, and as he has testified when he came back after having discussed his findings with Mr. Kalish and Mr. Rubinroit, the public accountants, he indicated to me that he was a little bit unhappy about the amount of engineering labor which was included in the claim, and since he had become aware of the fact that the Army Audit Agency had performed an audit of the hardship claim he thought it might be advisable to pay a visit to the Army Audit Agency in order to review

their working papers, and he was given permission by our chief, Mr. Sam Ross, to visit the Army Audit Agency. After spending the day there and reviewing the working papers he had noted that the total engineering through December 31, 1951, in the hardship claim was $900, whereas on the termination claim it was $72,000, and he came back to the office and reported that to me. I considered the discrepancy serious enough to warrant further investigation, accordingly I called up Mr. Mastros for an appointment, and Mr. Mastros indicated to me ——

THE COURT: Fix that time.

THE WITNESS: That was, I would say, October 7, 1953, the day Mr. Grossman returned from the Army Audit (222) Agency.

BY MR. FOGWELL:

Q. And you called Mr. Mastros that day?

A. I called Mr. Mastros the same day, I believe, and he indicated to me that he would have to contact ——

THE COURT: Better tell us what he said.

THE WITNESS: Well, the exact words, if I recall ——

THE COURT: Substantially, if you cannot recall.

THE WITNESS: I believe he indicated to me that he had lost prestige with the company and that the company wanted Mr. Rubinroit to handle any further information on the case. Accordingly, he indicated to me he would contact Mr. Rubinroit and I would get a call from them. I then received a call from Mr. Kalish who was associated with Mr. Rubinroit, and we arranged for an appointment the following day at one o'clock.

The following day at one o'clock Mr. Grossman and myself reported to Espey, and apparently Espey Manufacturing Company had assigned Mr. Rubinroit to carry on any further inquiries on the case which we might wish to direct.

Q. Did you confer with Mr. Rubinroit and Mr. Grossman?
(223) A. I did.
Q. Where?
A. It was in a conference room at Espey Manufacturing Company.
Q. What, if anything—when did you next see the defendant Mastros.
A. I believe he came back—he came into visit our offices, the Auditor General offices, the following day.
Q. Did you talk to him there?
A. Yes, I did.
Q. That was what date?
A. That, I believe, was October 8, or it was the day after I visited the Espey Manufacturing Company and held a discussion with Mr. Rubinroit. It was either the 8th or the 9th—I am not quite sure.
Q. At any rate Mr. Mastros visited you at your office about October 8; is that right?
A. Yes, either the 8th or 9th.
Q. The day after your conference with Mr. Grossman and Mr. Rubinroit?
A. That is correct, sir.
Q. When Mr. Mastros came in your office on or about October 8 what transpired?
A. Mr. Mastros had raised some inquiries as to what
(224) the status of the termination claim was, No. 1; and No. 2, I believe he expressed an interest in attempting to get another partial payment on the claim.
Q. Which claim?
A. On the termination claim. In other words, it is permissible to apply for a part payment on a termination claim.

Q. All right, when you say "claim" you mean the contract?

A. The termination proposal No. 3.

Q. What took place as a result of that, if anything?

A. Well, I had indicated to Mr. Mastros that in the visit with Mr. Rubinroit the preceding day that we had raised some question as to the discrepancy between the charges to 381 as shown in the hardship claim, as shown in a further transcript of labor which was developed during the subsequent audit performed by Mr. Hollis, and the charges as shown on the termination claim. I do further believe that I had asked Mr. Rubinroit to furnish certain additional information which would help the Government either to support the contention of the contractor or refute it. Mr. Rubinroit indicated he would have to look around for the figures and try to find out for us, and I had indicated to Mr. Mastros that we were waiting for the information in order to support or refute the contractor's contention.

(225) Q. So that in brief am I correct in understanding that about October 8, 1953, when Mr. Mastros came to your office that he asked about the possibility of concluding or passing upon the termination proposal No. 3 for this job; is that right?

A. That is right.

Q. And you advised him that it could not be concluded until you got additional data from Mr. Rubinroit?

A. That is correct.

Q. When you told him that what did he say?

A. Well, he indicated to me or suggested why couldn't I process the report and leave all the engineering for the further consideration of the contracting officer, which we might do under certain conditions, No. 1; and while I don't remember him having said it to me, if he has indicated he said it I will go along with him when he says he told me he would be willing to have an engineer come in and review the engineering estimate. I don't recall him having said it, but I believe him if he says he said it.

Q. Well, did he want to get this company paid for this contract? Was that his mission, if you know, in visiting you?

THE COURT: The court will sustain objection to that.

(226) MR. FOGWELL: I will withdraw it.

BY MR. FOGWELL:

Q. As his mission for visiting you you have told us he asked about the possibility of concluding, passing upon, or rejecting this third settlement proposal; correct?

A. That is right.

Q. Was there any discussion between you and him about any other contracts?

A. No, I believe that he did indicate to me that the company was pressed for money and would like to get a partial payment on the claim, and I had indicated to him in view of the fact that we were waiting additional information on a controversial item of cost because of the difference in records, I told him I suggested that he might attempt to get a partial payment on some other contracts to satisfy the needs of the company as far as money was concerned.

Q. You mean contracts that Espey had with the Government?

A. Yes; there are none in particular I had in mind. I just thought it should be another means.

Q. What, if anything, did he say to your suggestion that if the company was pressed for money he might get funds under one or more of the other contracts?

A. He didn't press that particular point. He said nothing particular.

(227) Q. Did you have any further discussions that day?

A. Yes, I did. We got back to this question of engineering and I believe I asked him whether Mr. Rubinroit had discussed the matter with him since I had directed my in-

quiries to Mr. Rubinroit the day before and he had indicated to me that he hadn't had any discussions, so I believe I indicated that there was a question we would raise as to the validity of the engineering charges because of the 381E job which did not appear during the hardship claim, and that had raised one of three alternatives in my mind; that is, No. 1, the 381E job was in existence during the time the hardship claim was filed, but Mr. Rubin ——

Q. You say "was" or "wasn't"?

A. Was. That was one of the alternatives. Was in existence, but Mr. Rubinroit had indicated that those charges were written off the books, and I was asking Mr. Rubinroit to present records which would prove that statement, which I had not as yet received. That was alternative No. 1.

Alternative No. 2, the presumption could be that there was not in fact a 381E job at the time of the hardship claim.

And No. 3, I said there might be some other possible explanation which the records which I requested of Rubinroit might help clarify in my mind.

(228) Q. Did you get those records from Mr. Rubinroit?

A. No, sir; I got a telephone call about a week later at which time he asked me where he stood on the claim and I asked him where the records were I had asked him for, and he said to me, "Well, what would happen if the records were lost?" And I indicated that, well, I would probably have to write up some sort of report and submit it to the contractors.

MR. KOSSMAN: That is Mr. Rubinroit.

BY THE COURT:

Q. Let me ask you, what did the defendant say to you when you suggested those three alternatives to him?

A. Absolutely nothing.

Q. Did you ask him? Did you make any inquiry about them to him?

A. No, sir; I suggested the three alternatives and let it go at that, because I was awaiting information from Mr. Rubinroit which would help the Auditor General to consolidate its position either for or against the contractor. At that point we were awaiting information on the basis of which to take an official position.

Q. Any information you were waiting for was from Rubinroit?

A. That is right.

(229) Q. Not this defendant? In other words, you didn't ask him to submit this to you, did you?

A. No. Let me explain this to you, your Honor. When you go out and perform an audit the contractor assigns an official to deal with. It could be possibly accountants. It could be the controller or the president of the company himself. When I made the appointment to meet the company I was greeted by Mr. Rubinroit. I have no interest in working with either Mr. Mastros or Mr. Rubinroit so long as the person I work with represents the company.

Q. I am not critical of you; I am not saying you didn't, but you were awaiting this information not from this defendant but from Rubinroit?

A. That is right, sir.

Q. You did not ask this defendant to answer or to qualify these three alternatives that you gave?

A. Absolutely not, sir.

BY MR. FOGWELL:

Q. Did you tell the defendant of your conversation with Mr. Rubinroit?

A. I don't know the extent to which I went into it, but I did indicate that I had had a discussion; I had raised certain questions; and I believe I asked him whether he had been apprised by Mr. Rubinroit of what had transpired.

(230) MR. KOSSMAN: Let us get the answer.

THE WITNESS: He answered that he had not been apprised by Mr. Rubinroit, which seemed a little bit unusual to me.

BY MR. FOGWELL:

Q. Did you ever get the records you asked Mr. Rubinroit for?

A. No, the last contact I had with Mr. Rubinroit was the following week when he called me up and was trying to raise a question, trying to get information as to where the company would stand if they could not find the records they were asked for.

THE COURT: I don't think we ought to get this in. We ought to be very careful. Rubinroit is not on trial here and we don't want these conversations with Rubinroit in anywise to reflect on this defendant. We are getting pretty close to the line here.

BY MR. FOGWELL:

Q. What, if anything, Mr. Goldenberg, transpired with reference to this contract relating to your personal knowledge, if anything?

A. Well, I believe Mr. Grossman then made a further check of other working paper files which we had compared.

Q. You are not allowed to state your belief here as to (231) what Mr. Grossman did. What, if anything, did you say or do in reference to this contract?

A. Well, I believe that Mr. Morris Pinsley, who is, I learned, the brother of one of the officials of the company, paid me, I believe—not paid me—visited the office on two occasions subsequent to October 8 and ——

Q. Can you tell us approximately when?

A. I would say—well, it would be within a 2-week period

subsequent to October 8. I believe I was paid two visits, and Mr. Pinsley ——

THE COURT: No, we won't go into that.

MR. FOGWELL: I think that is all.

THE COURT: We will have to recess for a few minutes.

(Recess.)

CROSS-EXAMINATION.

BY MR. KOSSMAN:

Q. Of course, we are going back to 1953; right?

A. Right.

Q. Have you had a chance before you testified to review any statements that you had given the Government?

A. Yes, Mr. Miller, the F. B. I. Agent, had interviewed me in, I think, the latter part of December, 1953, and (232) asked me to give a statement of the facts as I remembered them at that time, which I had given to him.

Q. I have asked the United States Attorney to furnish me with the statement you gave. Until that statement comes I will ask you a few questions. You said that the defendant called you up or came around to see you and said he lost prestige. Did you ask him why ——

A. That is right.

Q. —he had lost prestige?

A. No, sir; I don't recall ever asking him why.

Q. You knew that he told you he had been taken off the audit by Rubinroit?

A. It sounds like he logically could have told me that.

Q. Well, we don't want to deal in logic; we want to deal in what actually happened.

THE COURT: Well, that is his best recollection.

BY MR. KOSSMAN: Is that your best recollection?

A. It sounds logical.

Q. But he said he lost prestige?

A. That is right.

Q. Is it logical to say he lost prestige because he had filed the claim which you were contesting?

A. That is a possibility.

(233) Q. Well now, who did he lose prestige with, the Government? Or did he lose prestige with the people he was working for?

A. With the people he was working for.

Q. With the people he was working for?

A. That is right.

Q. That is your sense of understanding?

A. That is what I include in the sworn statement and it is my recollection.

Q. Now, isn't it a fact that he at that time wanted you to disregard what he had put on 381E and call in the Government engineers to evaluate the engineering from a technical standpoint?

A. That is right.

Q. Am I correct in saying that at that time Grossman thought it was a good idea?

A. No, sir; not so far as I recall.

Q. Don't you recall?

A. Grossman didn't get into the picture at all at that time.

Q. Wasn't he around there?

A. No, sir; I had a conversation with Mr. Mastros. Mr. Grossman was sitting at another desk.

Q. Well, didn't he walk over? You heard him testify—in all fairness, didn't he walk over?

(234) A. No, he walked over upon the conclusion of the meeting, and I think our hours usually end quarter of five,

and we stayed over perhaps to, let us say, five o'clock, and I walked out with Mr. Mastros, and I believe Mr. Grossman, to the best of my recollection, came over to say hello, and Mr. Mastros and we walked out together.

Q. Now, do you remember whether when he came over to ask you about this getting the money ——

A. Yes.

Q. —that he said, "Let us forget about that 381E; there is other moneys due"? Correct?

A. That is right.

Q. Is that an unusual thing to say, or is it the logical thing to say when there is an item in dispute?

A. From his point of view it was a very logical thing to say.

Q. From your point of view?

A. From my point of view I had asked for certain information that was pertinent to the audit, and I felt that if management wanted money they would present the information so that I would have a basis upon which to issue a report which I could stand behind.

Q. As a practical proposition this termination contract has been practically concluded and the audit satisfactory (235) to both people, and this has been withdrawn; isn't that right? This was the only item in this whole termination contract of any consequence, correct?

A. That is why ——

Q. —as it turned out.

A. $170,000.

Q. How much?

A. Engineering labor of $80,000 with overhead of ninety, approximately $170,000.

Q. That is the only item; isn't that right?

A. That is right.

Q. Of course, I am correct in saying that all this money that he came and asked for did not go to him; it went to the company; right?

A. Right.

Q. No doubt about that; right?

A. Correct.

Q. Are you familiar with the time when the $200,000 check which came out of your department—I will withdraw that.

Now, didn't Mr. Mastros have a discussion with you, if you recall, as to why he had written up what was originally $900 or $2000 there way back on the hardship claim—why he in his opinion thought it was $80,000? (236) Didn't he have a discussion with you?

A. I will answer it this way. The first time I found out about the records having been rewritten was when Mr. Miller so informed me two or three months later. That was the first time that I knew that records were rewritten based on any admission by company people.

Q. You knew there was $80,000 before you spoke to Mr. Miller?

A. That is right.

Q. Well, didn't you have a discussion before you met Mr. Miller with Mr. Mastros, and didn't he tell you why it was $80,000?

A. No, sir, I had a discussion with Mr. Rubinroit.

Q. Oh, and did he know the reason why it was written up?

A. He didn't say it was written up. When I asked him why the 80,000 ——

Q. Well?

A. I will tell you what he said.

THE COURT: Let the witness answer.

THE WITNESS: I asked him why the 80,000 or 70,000 of engineering didn't appear in the hardship claim and he indicated surprise and said, "Oh, didn't it?"

I said, "No, it didn't."

(237) He said, "That is unusual." Then he noticed we had the job cost record of 381 which showed, indicated, that

certain charges were written off every three months on the books. He says, "Well, probably the reason it was not included on the hardship claim was that these charges had been written off on the books, and possibly Mr. Mastros' predecessor overlooked it"; and in trying to find out the truth of the matter I asked him whether he didn't think it was unusual in presenting the hardship they included $26,000 and neglected to include $170,000 when the purpose of the hardship claim is to prove the total loss that would be incurred. You don't leave out dollars; you put in everything that is possibly applicable. And he said, "Yes, it is unusual," and that is when I asked for records to support these write-offs, and those are the records I never received.

Q. But you do not know as a matter of fact what actually took place, how much engineering time was actually spent on the contract that was originally 2000 and then 80,000; you don't know, do you?

A. Well, that wouldn't be material to an auditor.

Q. Well, it is material in this case.

A. It is material from the standpoint of records; it is not material from the standpoint of my having technical (238) knowledge, which, I didn't have.

Q. Did you make any attempt to find out whether the actual engineering work had been done?

A. There would be no reason for me—I was interested in getting accounting records; I am an accountant; I am not an investigator. I asked for accounting records which were pertinent to the audit. They were never made available.

Q. The company withdrew the claim; correct?

A. No, this took place subsequently.

Q. You mean after they withdrew their claim?

A. Well, they withdrew their claim some time after the F. B. I. got into the picture. They did not withdraw it as of the date ——

Q. When did they withdraw their claim?

A. Frankly, I don't know.

Q. Well, there is a record there, the amended return.
A. Oh, they filed the amended return.
Q. Amended claim.
A. Well, there are about four amendments. Which one are you referring to?

MR. FOGWELL: February. No. 4.

THE WITNESS: You refer to Amendment No. 4?

BY MR. KOSSMAN:

Q. I see we have a notation that the first amended claim (239) was filed February 17, 1954. Does that sound familiar to you?
A. I believe you are referring to Proposal No. 4.
Q. Yes.
A. I believe that is so. That I found out later.
Q. Now, this was a claim predicated on a contract that had a face value originally of $3,300,000; correct?
A. I believe so.
Q. What was the total amount, finally—termination value—how much was the whole termination value of the contract finally settled?
A. You mean the fourth proposal?
Q. The fourth proposal?
A. Is it in evidence? I wouldn't know from personal ——

MR. FOGWELL: I think it is G-9.

MR. KOSSMAN: Yes.

(G-9 handed witness.)

THE WITNESS: When you say the total, do you mean the total or the net amount of the proposal?

BY MR. KOSSMAN:

Q. Well, whichever one. There are the old figures. Is it correct? Does it express it?

A. It would be the net amount of the schedule, the last amount, $662,926.76.

(240) Q. How much was the gross amount?

A. The gross amount before disposal credits and advance progress or other payments was $1,308,419.19.

Q. $1,308,000?

A. $1,308,000.

Q. That was with the elimination of the $160,000 engineering; correct?

A. I believe the $160,000 was eliminated.

Q. Am I correct that those were eliminated after he was in the picture? Didn't this company file a proposal in which they asked for $1,400,000?

A. Yes, but let me point out ——

Q. Well, the answer is yes or no.

A. Well, there is a reason for the difference.

Q. Yes, they surely gave a reason.

A. Yes.

Q. They did file asking for another hundred thousand; right?

A. Right.

Q. Has that been processed through?

A. I believe that my office has performed an audit and has issued an audit report on the claim.

* * * (N. T. pp. 240 to 242 inc.)

(242) BY MR. KOSSMAN:

Q. I want you to know that when I ask you a question it is really based on what is said. You can verify it if there are any doubts in your mind.

A. O.K.

Q. This was a statement you gave in January, 1954. You stated there, "At approximately one p. m. on October 7, 1953, Grossman and I"—the I, of course, referring to yourself—"met Rubinroit at Espey's plant and held a (243) conference in Espey's conference room. Mr. Mastros was not present at this conference and Rubinroit indicated that Espey wanted him to handle the matter," rather than him. Is that a correct statement?

A. That is absolutely correct.

Q. You asked Mr. Rubinroit for all job ledger sheets both open and closed from 1950 to date, and also requested monthly summary sheets on both engineering labor and production labor. Now, do you know whether those job ledger sheets were produced?

A. Yes, sir.

Q. They were produced?

A. They were produced.

Q. And the monthly labor summaries were also produced?

A. Yes, sir.

Q. You and Grossman both examined the job ledger sheets and you noticed at that time Job 381E had credit entries posted therein; is that correct?

A. That is right, sir.

Q. And that this job was the only one in the job cost ledger which did have credit entries; is that correct?

A. That is right, sir.

Q. Now do you remember—I will put it this way—this is the statement that you gave, and I will ask you (244) whether it is correct or not.

A. All right.

Q. You at that time stated, "I asked Rubinroit why the settlement proposal shows engineering labor for Job 381E for the period ending December 31, 1951, in a considerable amount, where as the 921 claim, hardship claim, submitted by Espey, did not contain such costs. Rubinroit," continuing your statement, "first expressed surprise that the 921 claim did not reflect such costs, and then said that the 921

claim, which is the hardship claim, had been prepared by Espey's former controller, Sam Levine, and suggested that possibly it was an oversight on the part of Sam Levine that such costs were not included in the 921 claim." Do you remember ——

A. I have previously testified that; yes, sir.

Q. I am sorry—I don't remember you stating that controller Sam Levine ——

A. It is in the record. It is true. It is in the record.

Q. But at any rate that is what the answer was from the company's auditor who had taken over?

A. That is right, sir.

Q. Now, you told Rubinroit that it didn't sound logical that Levine would include the costs represented by the 381E account which with overhead added would amount to approximately (245) $150,000; is that correct?

A. That is right, sir.

Q. Now, Rubinroit agreed with you; is that right?

A. That is right.

Q. And he then said that these costs were charged to cost of sales, and therefore were not reflected in the inventory as of December 31, 1951?

A. That is right, sir.

Q. Now, on Page 8 after these particular three questions, when Mastros came to visit you you told the agent that Mastros suggested that if engineering labor was the only portion of the settlement proposal that was being questioned it be referred to the contracting officer for determination as to the proper engineering charge; isn't that correct?

A. That is right.

Q. That is what he told you then?

A. That is right.

* * * (N. T. pp. 245 to 251 inc.)

(251) BY THE COURT:

Q. Let me ask you—you went to Rubinroit and you talked to Rubinroit about it and he gave you certain information, and I think some of the other witnesses talked about—had you any reason for not going to this defendant and saying, "Here is a hardship claim that you did not prepare. Here is 381E which shows a boost in it. Tell me, for accounting purposes, in order to justify your figures, is that the ordinary procedure?" Didn't you go to people and say, "Here is a disparity; can you explain it?"

A. Yes, sir; as I mentioned, I had called up Mr. Mastros for an appointment to perform additional work to satisfy us as to what the facts of the matter were, and I was referred by Mr. Mastros to Mr. Rubinroit on the basis of that statement that he made that the company preferred Mr. Rubinroit.

Q. That is right.

A. I have no right to deal with any individual the company does not want me to.

Q. I know, but here the Government indicts this defendant. I'm wondering why you asked Rubinroit and didn't go to this defendant and say, "Here, you didn't prepare this (252) hardship claim and here we find 381E." Didn't it strike you that you should go to this man and ask him whether he had an explanation? Maybe he didn't.

A. This man wasn't under indictment at the time.

Q. I know he wasn't. Neither was Rubinroit.

A. That is right and the only reason I dealt with him was because he was delegated by the company; the company delegated him.

Q. I know that, but you were there checking fraud. Nobody had committed a criminal act. I am only making the inquiry from your point of view, not the F. B. I.; but from accounting practice, having talked to Rubinroit about it, wouldn't you go to this accountant and say, "Here, do you have any explanation for this?" You talked to Rubinroit about it, didn't you?

A. Only because the company had delegated him, and I was going in accordance with the company's wishes.

Q. Well, I know, but when you investigate a company ——

A. We weren't investigating, sir; we were just auditing.

Q. But you were examining the books of the company and examining this terminal statement: You don't just take the word of somebody the company sends to talk to you, do you?

A. No, sir; we ask for records.

(253) Q. You ask for records and those who kept them, those who are responsible for their preparation?

A. No, sir; as I say, the way our organization operates, when we perform an audit the company usually delegates an official representative of the company to deal with us. We would not care whether the president, vice-president, controller, or public accountant. We deal with all manner of them, depending on the wishes of the company in the individual case, just so long as we can get the information.

Q. That is right When you get it, once you see a disparity don't you go to them, whether vice-president, president or accountant, and don't you say, "We don't understand this"?

It may be an error, a clerical error, or it may be a very deliberate and considered falsification, but don't you make any inquiry about the figures?

A. Well, we had made our inquiries of Mr. Rubinroit and we were waiting for certain records that would either prove or dispel any possible suspicions we had. I was waiting for that record before we would come to any firm conclusion, and what happened in the interim, by reviewing our working papers we had found some other record which was made available to one of our auditors which had indicated rather clearly to us that there had been an indication that records were (254) rewritten. At that point, and that was considered serious, we coordinated with the chief of the branch and the top men in the district to adjudge the in-

formation we had to determine whether we should issue a fraud report, or alleged fraud, which is very serious in our office, and we would want no one person to have the responsibility. It was the considered opinion that based on the information ——

THE COURT: I think that is a conclusion to which there may be objection.

BY MR. KOSSMAN:

Q. From your knowledge of this case could the defendant personally benefit by filing a false claim for engineering? Could he get any money from the Government?

A. From the Government?

Q. Yes.

A. The Government makes payments to the name of the company which is on the contract.

Q. In other words, he could not personally benefit as far as getting money from the Government by filing this claim; is that correct?

A. Not by getting money from the Government directly, no, sir.

Q. Do you have any evidence that he got money from anybody else?

(255) A. No, sir; absolutely none.

* * * (N. T. pp. 255 and 256.)

(257) THE COURT: Do you want to be heard, Mr. Kossman?

MR. KOSSMAN: I was wondering whether or not due to the fact that the Father came in from New York, and has not been feeling well—I could not predict when the case would break—whether he could be called out of turn as a character witness. It would take one minute.

THE COURT: Can't you stipulate?

MR. FOGWELL: I don't question his good character.

MR. KOSSMAN: But a stipulation is awfully dry. He is here. He came in from New York. He has definitely feelings about this individual. If not, he will have to wait.

THE COURT: How long will we be? I hate to bring the jury in and take them out. Are we going to argue the point?

MR. KOSSMAN: No, I feel primarily it is a matter for these two to decide. I have no part in that.

THE COURT: Are you going to be through?

MR. FOGWELL: The Government's plan now is to get Mr. Nathan Pinsley to put the corporate records in evidence. Mr. Kossman tells me has no objection to our calling him in the same capacity as the others.

Then I have the F.B.I. agent, and that is all.

(258) MR. NOCHEM S. WINNET: In other words, the four employees at one time can be excused.

MR. KOSSMAN: What I mean by saying I have no objection to calling him is this ——

MR. FOGWELL: Calling Mr. Nathan Pinsley of the corporation to put the records in.

MR. KOSSMAN: Well, if you call him, I will not make any particular motion even though I am advised that if he is going to be questioned he will claim self-incrimination, but I won't object to that. But the other four ——

MR. FOGWELL: Then we will let the other people go.

MR. KOSSMAN: So that eliminates the question.

THE COURT: I have been looking up the law.
Bring the jury in.
Do you want to make an explanation to the jury, Mr. Kossman?

MR. KOSSMAN: I don't want to be influencing the jury. Maybe the Court should say that. I want the Court also to know that I called up the District Attorney's office and gave them the citation.

THE COURT: Yes, you sent citations down, and they are what I have been looking at.

(259) MR. FOGWELL: I don't know. We don't even object to each other's improper questions.

MR. WINNET: We spent all night on it, too.

THE COURT: I believe that

(Jury in box.)

THE COURT: Ladies and gentlemen, both the United States Attorney and counsel for the defense have agreed that a defense witness be called at this time out of turn. As you know, the Government's case is on, but a priest, I believe from New York, is here who is to testify as a character witness for the defendant, and by agreement with the Government, since he is not well, counsel have agreed that he may be called out of turn in the Government's case as a defense witness, a character witness for the defendant.
All right, Mr. Kossman.

DEFENDANT'S EVIDENCE.

E. H. SIMONIAN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

BY MR. KOSSMAN:

Q. Father, are you a pastor of the Holy Cross Church in New York City?
A. Yes, sir.

(260) THE COURT: You may sit down if you wish.

BY MR. KOSSMAN:

Q. Do you know George Mastros?
A. Yes.
Q. Do you know other people who know him?
A. Yes.
Q. What is his reputation?
A. Very good.
Q. For being an honest, law-abiding citizen?
A. Very good.

MR. KOSSMAN: That is all.

CROSS-EXAMINATION.

BY MR. FOGWELL:

Q. Father, do you have him as a parishioner? Is he a parishioner at your church?

A. Well, he is, yes.

Q. You are not familiar with his day-to-day business activities?

MR. KOSSMAN: I am not so certain that that is proper.

THE COURT: No, you cannot cross-examine except as to character and reputation.

Do you understand the question, Father? You are (261) not familiar with his day-to-day business activities, are you?

THE WITNESS: No.

MR. KOSSMAN: That is all. Thank you very much.

GOVERNMENT'S EVIDENCE (RESUMED).

NATHAN PINSLEY, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

BY MR. FOGWELL:

Q. Your name is Pinsley?
A. That is right.
Q. Your first name is what?
A. Nathan.
Q. Where do you live?
A. 22 Linford Road, Great Neck, New York.
Q. What is your business?
A. I am president of the Espey Manufacturing Company.

THE COURT: Just a moment. May I see counsel at side bar. Do you want to come up, Mr. Kossman?

MR. KOSSMAN: I do not.

(Mr. Fogwell and Mr. Winnet confirm with the (262) Court at side bar.)

BY MR. FOGWELL:

Q. Will you read the last question and answer?

(Question and answer read by the reporter.)

Q. Were you such in 1953?
A. Yes, sir.
Q. Have you appeared pursuant to the Government subpoenaing certain corporate records?
A. Yes.
Q. What records have you brought?
A. I have brought copies of Job No.—of original and revised sheets of Job No. 381 and 381E.
I have brought all the cards we have and labor distribution summaries for the period covering July 1, 1950, through June 30, 1953. I also have the time cards for the month of September, 1951, and the time cards for the week ending August 12, 1950, August 19, 1950, and August 26, 1950.

(Counsel confer.)

Q. We can go into the details later after you have gone from the stand, but are these the records and books that you have brought down?
A. Yes.
Q. And these yellow horizontal cards are what? What do (263) you call those?
A. Time cards.

Q. And these are the same?

A. Yes.

Q. Now, I show you a photostat of what appears to be a ledger sheet and ask you if you can identify that as a corporate record?

A. This is one of the records given me pursuant to the subpoena. I could not positively identify any of the records, except as I instructed people to collect these records and give them to me.

Q. Well, is that the job cost record of 381E?

A. This one is labeled FJ-381.

(Counsel confer.)

MR. FOGWELL: Now, I show you two others ——

THE COURT: Have you seen these records?

MR. WINNET: I have not, sir.

THE COURT: You had better show them to him. On these records there may be a question of competency.

(Mr. Fogwell and Mr. Winnet confer.)

MR. WINNET: If Your Honor please, we brought the records in. Could I have five minutes with my client to go over them? Would Your Honor indulge me?

THE COURT: Certainly.

(264) MR. WINNET: I am sorry to take this time.

MR. KOSSMAN: What's that?

MR. FOGWELL: He wants to talk to his client.

MR. KOSSMAN: Oh.

MR. FOGWELL: Perhaps we ought to have the record show who was just speaking to Your Honor, the man in the glasses, shouldn't we?

THE COURT: I don't know whether his appearance is entered.

MR. FOGWELL: Mr. Winnet, counsel for the existing witness.

MR. WINNET: I don't think we need further time. It is perfectly all right.

THE COURT: I think while he is on every record should be submitted to counsel.

BY MR. FOGWELL:

Q. Now, I show you two other 2-page photostats purporting to be photostats of ledger cards of your corporation, and to save time I would like to ask you, is the first one the revised 381E—pardon me, the revised 381?

MR. WINNET: If Your Honor please, I am grateful for the courtesy Your Honor has shown me. All this witness can say is that these are the records that he found. Whether they are revised or not, I must object to. He is here (265) pursuant to subpoena. He has brought records.

THE COURT: Yes, I think if you go into these records you open that up to the extent that this witness will then waive ——

MR. FOGWELL: May I rephrase the question and ask, are these two records of your corporation? Is that all right?

MR. WINNET: I have no objection.

MR. FOGWELL: I assume the answer is yes.

THE WITNESS: These are records of our corporation.

(Photostats produced by the witness marked Exhibits G-14, 15 and 16.)

MR. FOGWELL: May we see Your Honor at side bar.

MR. KOSSMAN: I don't want to have any participation in this.

MR. FOGWELL: Yes, this does not concern that particular item.

(Messrs. Fogwell, Kossman and Winnet confer at side bar.)

MR. KOSSMAN: If the Court please, I want to excuse myself from this conversation.

THE COURT: That is quite all right, Mr. Kossman; you are excused.

(266) (Side bar conference between the Court and Messrs. Fogwell and Winnet continues.)

(Counsel confer.)

MR. KOSSMAN: Look, whatever you want to bring in, bring in; don't ask me anything about it.

(Group of photostats marked Exhibit G-17.)

(Group of photostats marked Exhibit G-18.)

(Two pages of photostats marked Exhibit G-19.)

BY MR. FOGWELL:

Q. I show you G-17, 18 and 19 and ask you if these are also corporate records?

A. These are records of Espey Manufacturing Company.

Q. What position did you hold with that corporation in 1953?

MR. WINNET: If Your Honor please, I represent Mr. Pinsley, and I ask permission, Your Honor, to warn Mr. Pinsley, who has been under investigation in this matter, of his Constitutional rights, and that he has the right to claim the privilege. I ask that either I advise him or, as I understand the cases, that Your Honor do so.

THE COURT: You have the privilege of advising him if you so wish.

MR. WINNET: You have the right to claim your privilege against self-incrimination.

(267) THE COURT: Do you want to answer that question, sir?

THE WITNESS: I have already stated I was president of the company, before.

MR. WINNET: Well, you have the right to claim your privilege

THE WITNESS: I refer to answer the question on the ground of self-incrimination.

THE COURT: In view of the testimony that has gone into this record showing Mr. Pinsley's connection with the

company, I am going to grant his counsel's motion and sustain his right to refuse to testify on the ground of self-incrimination.

MR. FOGWELL: In view of Your Honor's ruling, I think that is all.

MR. KOSSMAN: Do I understand the district attorney does not want to pursue this matter any further?

MR. FOGWELL: I would like to very much, but I cannot swim uphill.

MR. KOSSMAN: Well, may I ask him questions or am I precluded?

THE COURT: You may ask him questions as to corporate records. The privilege of the corporation is not an individual privilege.

(268) MR. WINNET: May I ask.——

THE COURT: No, you may not.

MR. KOSSMAN: I don't want to ask him any questions.

THE COURT: All right.

BY MR. KOSSMAN:

Q. I assume—am I correct—if I am going to ask you personal questions you are going to claim self-incrimination?

A. Yes.

MR. KOSSMAN: I have no questions, then, under the circumstances.

THE COURT: All right, you are excused, sir.

MR. FOGWELL: Neither have I, under these circumstances.

THE COURT: All right, let us get along.

RICHARD A. MILLER, having been duly sworn, was examined and testified as follows:

THE COURT: I want the jury to know, so that all of them may know, what was going on. The Government subpoenaed the records of the Espey Corporation. Mr. Pinsley, who is president of the Espey Corporation, responded with the corporate records. An individual has the right to claim privilege when questions propounded to him may tend to (269) incriminate him. He may not refuse to comply with the order for production of corporate records, because the corporate privilege does not extend to him as president; he must produce the records. He cannot claim self-incrimination on the grounds that the records may incriminate him. That he must do. He must produce the records.

Now, when questions are directed to him personally he may at any point claim his privilege, and the law is rather zealous about persons claiming privilege; therefore, in the light of the testimony that this record shows with respect to Mr. Pinsley, Judge Winnet who is his counsel has advised him to claim the right against self-incrimination, and he takes advantage of that right and so claims it, so personally he does not have to answer questions which in the judgment of the Court and himself might incriminate him. He has taken advantage of that privilege and therefore he does not have to answer.

DIRECT EXAMINATION.

BY MR. FOGWELL:

Q. What is your name, sir?
A. Richard A. Miller.
Q. Mr. Miller, by whom are you employed?
A. The Federal Bureau of Investigation.
(270) Q. In what capacity?
A. Special Agent.
Q. Keep your voice up very loud so the last four ladies can hear you. Special agent of the F.B.I.?
A. That is right.
Q. Where are you presently assigned?
A. New York Office.
Q. Did you have occasion on behalf of the F.B.I. to investigate a case in which the Espey Manufacturing Company was connected?
A. I did.
Q. When did you first get into this case?
A. I was called into the case about the end of October, 1953, by Lt. Col. Couch of the Signal Corps Procurement Agency in New York City.

(At this point Mr. Winnet left the courtroom.)

BY MR. FOGWELL:

Q. Tell the ladies and gentlemen of the jury, in brief, if you will, generally just what you did.
A. After discussing the matter with Col. Couch and Mr. Grossman and Mr. Goldenberg I arranged for an appointment to discuss the matter with Mr. Pinsley, Nathan Pinsley, and subsequently with Mr. Mastros.
After two conversations with Mr. Mastros, on the third conversation he executed a signed, sworn statement. (271) In that statement and in discussions with him he acknowl-

edged that he had caused the transfer of $77 thousand some odd of engineering labor from some forty-seven other jobs thirteen of which, I believe, were commercial jobs, to this particular contract. He had the engineering labor set up in an account which he designated 381E. He informed me that the reason why he had it transferred was because upon the termination of the contract and when he started to prepare the settlement proposals he discovered that there was only a small amount of engineering labor in Job 381, which was the job number assigned to this particular contract. The amount in Job 381 was $2314.

He stated to me that from his experience at his former place of employment, Hazeltine Electronics Corporation, he had realized that there should be 2 to 3 per cent engineering labor incurred in connection with a contract of this type. The 2 to 3 per cent was based upon the sales value of the contract. In other words on a 3 million dollar contract he figured that there should be approximately $90,000 worth of engineering labor incurred. For that reason he instructed three cost clerks ——

THE COURT: He what, sir?

THE WITNESS: He instructed three cost clerks.

BY MR. FOGWELL:

(272) Q. When you say "he", whom do you refer to?

A. Mr. Mastros. He instructed three cost clerks working for Espey, namely Aaron Silvers, Herbert Potaker, and Michael Barbarone to transfer approximately 2 to 3 per cent—put it this way—to make transfers so that the total amount of engineering labor which would then be in Account 381 or chargeable against Account 381 would amount to 2 to 3 per cent of the value of the contract. He stated that he told these three cost clerks the period during which the transfer should be made. He stated that he told them

that they should start the transfers from August, 1950, and should make no transfers after May, 1952.

He stated that the reason he picked August, 1950, was that it was about a month after the company had received the contract, and he assumed that they immediately went into engineering work, they immediately started their engineering work. He stated that he told the cost clerks not to make any transfers after May, 1952, because of the fact that that was the date that the model was submitted for approval to the Signal Corps. He informed me that while he told the three cost clerks to make the transfers during this particular period he did not tell them what contracts to make the transfers from, and actually did not know from which contracts the labor had been transferred until he prepared an analysis (273) at my request. He stated this with one reservation that he had told them not to make any transfers from one or two Air Force jobs which were then current jobs. The reason given was the fact that these Air Force jobs, the engineering labor contained therein, to quote him, "Looks pretty good".

He further stated that he could not very well remove engineering labor from those jobs because the company had received partial payments already, and they were still current jobs. This was given as a secondary reason. He stated that when the contract was terminated it was of the utmost importance to determine how much labor was going to be transferred. For this reason the cost clerks apparently prepared a tape of the amount of labor to be transferred, and thereafter at his instructions they erased or modified, altered the time cards.

Now, the time cards which you have seen have on the back the Code 381 for this particular job. It is recorded thereon. It was necessary to alter or change the job number on there inasmuch as labor was being transferred from other jobs to 381. Thereafter at his instructions the weekly and monthly labor summaries were changed to agree with the new distribution on the time cards, and finally the job

cost ledger was changed to agree with the labor summaries. He stated that this work was started in March (274) and completed some months later.

I asked him why he did not use a journal entry to correct the books, and I used "correct" because he stated that when he had the books rewritten he had them rewritten because he thought that the books were incorrect and he thought the best way to correct them was to rewrite them.

I asked him why he did not use a journal entry inasmuch as it would save a rather tremendous amount of time that was taken to rewrite the records, and he stated that he did not stop to think that a journal entry might have been used. He did state, however, that at Hazeltine, when he was employed there for a number of years just prior to the time that he went with Espey, that he had always used a journal entry to make any such corrections as he was doing in this particular instance.

He stated that at Hazeltine they had a job cost ledger system; they always used journal entries to make transfers from one job to another. He did state that he did not recall any instance in which labor had been transferred from one job to another, because labor was always distributed properly in the first instance at Hazeltine. There were, however, he said, instances in which material had been transferred from one job to another. He stated that the reason for this was that in some instances (275) material is purchased for a job and it could be used on more than one job. It may be initially charged to the particular job and then decided to use it on another job, and therefore there is the necessity of making a transfer. At Hazeltine, however, the transfers of materials were approved by the project engineer, since it is only the project engineer who could actually determine that the transfer is proper. Now, he indicated to me ——

Q. Who is the project engineer?

A. At Hazeltine?

Q. Well, anywhere.

A. He would be the engineer who is in charge of the particular contract. You mean an employee of the contractor or the Government?

A. Yes, he is an employee of the contractor who has executive responsibility for that particular contract.

Q. Excuse me; I did not mean to interrupt you.

A. He acknowledged to me that these transfers that he caused to be made were made without first determining that the labor had been incorrectly charged in the first instance, stating that the sole basis for his believing that the books were incorrect was the fact that he had come to the conclusion, from his experience at Hazeltine in working on termination settlements, that contracts should have 2 to 3 (276) per cent of engineering labor. In this particular instance he acknowledged that this contract was terminated prior to the time that there had been any deliveries on the major portion of the contract and on the portion which was terminated.

At my request he prepared an analysis showing the forty-seven jobs from which he had made the engineering labor transfers. This analysis I checked by reviewing or comparing what were called the original labor summaries and the revised labor summaries. By comparing the original labor summaries with the revised labor summaries you could find that a job, just taking any number of job arbitrarily, Job 250, for instance might have had $100 charged to it as engineering labor on the original labor summary, and on the revised labor summary it would have only had say, again the abritrary sum of $50. The difference of $50 between the original and the revised was transferred to Job 381E.

Now, he made up this schedule of transfers by going through all of his original and revised labor summaries and tabulating the differences between the amounts charged to particular jobs on the original labor summary as compared with the revised. The difference was charged to 381E. And on that basis he prepared a schedule in which he showed the monthly transfers ——

Q. Now, what schedule do you have there?

(277) A. This has not been introduced.

Q. What do you call it?

A. Well, it is headed Direct Labor Engineering Transferred to Job 381E, Period August, 1950, to May, 1952. It is initialed by George Mastros on one side, and is dated by him on November 23, 1953.

Q. Well now, is this the transfer schedule that Mr. Mastros prepared and presented to you at your request?

A. It is, yes.

MR. FOGWELL: Perhaps we ought to have it identified.

(Tabulation entitled Espey Manufacturing Company, Inc., Direct Engineering Labor Transferred to Job 381E, Period August, 1950-May, 1952, marked Exhibit G-20.)

BY MR. FOGWELL:

Q. Suppose you hold it up if you can and as best as possible explain to the judge and jury, as you see it, just what it is.

A. Well, it is a 2-page schedule which has across the top of it the various months from August, September, October, and so forth, of 1950 to May, 1952. Down the side, the left-hand column, it lists the various jobs. It lists first the job number and also the contract. In the (278) third column it lists or it indicates whether it is a fixed-fee contract or a commercial contract. You will note from reviewing it that there are approximately thirteen commercial contracts shown. It merely shows the transfers which were made from the particular jobs shown on here, and there are forty-seven of them shown on here, thirteen of which were commercial and about twenty-six were fixed-fee contracts. A few were what are called redetermination contracts. It shows on Page 2 at the extreme right that a total of $77,781.92 was transferred from these forty-seven jobs

during the period extending from August, 1950, to May, 1952. This was transferred to Job 381E and it was so recorded in the job cost ledger. That is a job separate and distinct from the 381 job which shows a total of only $2314 during the period from the inception of the contract to the time it was terminated.

Q. How does the $77,000 figure which you have in the lower righthand, second page, of that which Mr. Homan has labeled G-20—how does that $77,000 figure tie in, if at all, with the $77,000 recited in the third settlement proposal which I think is G-8?

A. The third settlement proposal claims engineering labor in the amount of approximately $80,000. This $77,000 —$77,700 some together with the $2300 agrees with the (279) $80,000 claimed in the third settlement proposal. In other words, you need the two figures the $2300 which is in the 381 account and the $77,000 which is in the 381E account to total the $80,000 which is claimed in the third settlement proposal.

Q. See if you can find the $80,000 figure on G-8. (Handing witness.) On the third page do you find the $80,000 figure?

A. Yes, I do.

Q. I think the $80,000 figure, you told us a minute ago, was a total of $77,000 some and $2300 some.

A. That is the $80,000. This is it.

Q. How about the figure just below that?

A. That is the figure for engineering and engineering overhead of $92,810.04.

Q. How does the engineering overhead tie into that figure?

A. The engineering overhead is applied on the basis of the engineering labor so that the more engineering labor is the more engineering overhead will be, the rate being constant. The engineering overhead follows the engineering labor.

Q. I want you, as much as you can, to take your mind

back to the very beginning. I think you told the ladies and gentlemen of the jury that Mr. Mastros advised you that he (280) directed some cost clerks under his supervision to modify certain time cards, time summaries, and so on. What did you mean by that? Is this the type of time card that you meant, the long yellow ——

A. Yes, that is a time card. On the reverse side you see distribution to the particular job. These distributions were erased.

Q. Excuse me just a second; I think you are rushing Mr. Homan a little bit. Could you speak a little slower?

A. All right.

Q. It doesn't make any difference to me; but it is easier for him. Hold this up and explain to the ladies and gentlemen of the jury if you can what is meant by this, name, hours, job, and so on.

A. Well, this is Employee No. 517. It shows that on the top. Right beneath it is his name, Edward Robinson. It also has social security number and it has the date. It is for the week ending August 12, 1950. On the extreme left it has a column here. Job No. 381 is inserted underneath that column. Then it has the six days of the week, Monday through Saturday, and it has the total hours next to the last column on the right, and the cost. Now, in the total hours column is inserted 40, and the salary of Edward Robinson is put in there as $125. The Monday through (281) Saturday is blank in this particular instance which indicates that the 40 hours which he worked were charged to Job 381.

Had he split his time, on Monday, for instance, there might be a notation under Monday that he worked four hours on Job 381 and four hours on some other job on that particular date.

On the reverse side there is ordinarily the time recorded by the time clock. In this particular instance there is no clock recording at all, apparently for the reason that Edward Robinson, as I recall, was, I believe, an engineer, and as such he was not required to punch the time clock. For

anyone required to punch the time clock there would be in and out clock marks on the opposite side that would show he worked eight hours a day. On the back would be recorded the fact that he worked eight hours on Job 263, 381, 456, 437—whatever job he worked on.

Q. So that would mean over the course of the week or even over the course of one day a particular employee might work on one or more jobs?

A. Very often they work on more than one job. In this particular instance it shows here that he worked on just one job.

Q. Then how do these cards fit in with the weekly time summaries?

(282) A. Well, these are weekly time cards. The weekly labor summaries are made up from these. That is the basic record from which the weekly summaries are made up. After the weekly summaries are made up, at the end of the month the monthly summaries are made up from the weekly summaries.

Q. Then where do you go from the monthly summaries?

A. From the monthly summaries the total figures which constitute the summary of these cards, how much time spent on 381, 253, or on all the jobs—that summary, which is the monthly summary, is then posted to the various jobs contained in the job ledger, along with material and overhead.

Q. And, accordingly, labor billed to that job in question?

A. I beg your pardon.

Q. And labor billed to that job in question?

A. Well, it is directly chargeable against that job. If it is a fixed-fee contract, why ——

Q. The thing I am not quite clear on—you said that Mr. Mastros advised you that when he went to prepare the termination settlement for Job 381 he found only some $2300 worth of labor engineering in it.

A. That is right; there was only $2314 of engineering labor in Job 381 at the time of the termination.

Q. And you say he then advised you that under his direction he modified a quantity of these daily time cards?

(283) A. That is correct.

Q. And the weekly and the monthly?

A. He had one of the cost clerks change the time cards to reflect that Job 381 had been worked on. Now, the modification was made by showing that Job 381 was worked on, but the time was actually charged to 381E. That was set up, according to Mr. Mastros, to accumulate the amounts that were being transferred in one account—that was one reason—another reason was that he thought that the jobs from which the transfers were being made were actually closed jobs and actually had been charged to cost of sales. He did not want to put those costs in Job 381 because the costs in Job 381 had not been charged to cost of sales. It would be a double charge to cost of sales. This he wanted to prevent. For that reason Job 381E was set up, and for that reason the job was ruled to show that it had been charged to cost of sales. He acknowledged that he later found out that several of the jobs had not actually been closed or charged to cost of sales, and for that reason actually a journal entry should have been made on the general books to adjust them.

Q. Well, did he give any earthly reason why he should just arbitrarily transfer some $77,000 worth of labor?

MR. KOSSMAN: I object to the word "arbitrarily," (284) if the Court please.

MR. FOGWELL: May I change it?

BY MR. FOGWELL:

Q. Did he give you any reason why he changed or just pulled out of some forty-seven contracts unrelated to this Government contract $77,000 worth of labor and transferred it ——

A. No, we discussed that matter quite thoroughly, or attempted to, and his only explanation was that he thought it should have 2 to 3 per cent engineering labor in it.

Q. But other than that was there any paper work behind it to justify it?

A. No, he presented none. We tried to get into it as to how he could reason that any particular contract should have any particular amount of engineering labor chargeable to it, without knowing what the contract was about. It was apparent in this case that he had not reviewed the contract. He so indicated. Now, we questioned him as to how he could say that 2 to 3 per cent should be charged to such a contract, how he could say that any arbitrary percentage should be charged to any contract. It would differ depending upon whether it was a production contract or a development contract.

Q. You had better tell the ladies and gentlemen of the (285) jury what you mean by the difference between a production and a supply contract.

A. Well, a production contract is one, you might say, in which the Government furnishes a model, furnishes drawings and specifications. It is actually a production job. The company produces a model which is satisfactory to the Government, then it goes into production.

With a development contract, on the other hand, the Government furnishes specifications and possibly drawings. They indicate what they would like. They leave a lot of the development work to the contractor. It is encumbent upon him to develop a product which may meet the specifications. Actually it means just what it is called—it is a development contract; it is not predeveloped for them.

Q. I show you three more of these daily time cards ——

(Time Card dated September 15, 1951, Walter Irwin Cash, marked Exhibit G-21.)

(Time Card dated September 1, 1951, Marcus Sodeberg, marked Exhibit G-22.)

(Time Card dated September 15, 1951, Marcus Sodeberg, marked Exhibit G-23.)

Q. (Continued.) —G-21, 22 and 23, and ask you if you reviewed those in the course of your investigation?

A. I would say yes, I did review these.

(286) Q. You told us a few minutes ago that Mr. Mastros told you that he had changed or altered—I forget the word you used—what did he say in reference to those time cards?

A. He said that he had the three time clerks change the time cards, change the distribution on the back to reflect that it now was chargeable to Job 381, whereas prior to that time it had shown something else.

Q. Did he say whether it was made by striking out and replacing or whether it was made by erasing and then reinserting? What did he say along that line, if anything?

A. Well, I would just have to say that he said they were changed to reflect Job 381, that it was obvious they were not struck out; the original job was erased and the Job 381 inserted in lieu of the original job.

Q. Now, generally you mean over on the lefthand side?

A. On the lefthand side.

Q. Where I have here 381?

A. That is right. Under "Job Number" in this particular card here, which is G-21, they have four jobs that have some time charged to them, to each of them, during this particular week. Job 381 has four hours charged to it on Monday and two hours to it on Wednesday. Job 373 has one hour on Monday, one-half hour on Tuesday, and two hours on Wednesday. In fact, in this particular instance you can (287) see that there was some other job recorded underneath 381. You cannot make out what the job was, but you can determine that there has been an erasure.

Q. Did he advise you as to what plan or approach they had used as to why they had taken X number of hours from Contract No. 1,026, we will say?

A. He stated that he told the three cost clerks to make these transfers; he told them the period during which they should be made, but he did not tell them from which contracts the transfers should be made; in fact, he didn't even know until he made up the summary for me.

I think that covers that.

Q. Now, you say that he advised you that some of these hours were taken from closed contracts and some from open contracts?

A. Yes; that is correct. He thought at first that all the time was being transferred from so-called closed contracts. He told me at the time I talked to him on November 23 and 24 that he had since found out that some of the contracts were apparently open contracts and not closed. He incorporated that in his signed statement.

Q. And some of them, you say, were Government contracts, and some were commercial.

A. Some were commercial. About thirteen were commercial (288) contracts.

Q. What did you mean when you spoke about the journal entry a few minutes ago as to Mr. Mastros saying to you that it was done in this manner by ordering the time cards and schedules all the way back out of the series of jobs and into 381. What do you mean by doing it by journal entries rather than in that manner?

A. Well, by using a journal entry, particularly where the general books are concerned, the entire correction is made by the use of the journal entry. The journal entry in this particular instance would have eliminated the necessity of rewriting these voluminous records. These were rewritten for—well, the labor summaries, the weekly labor summaries, were rewritten; the monthly labor summaries were rewritten; and the job cost ledgers were rewritten over a period from August, 1950, through May of 1952. Now, that is a long period of time and it would take quite a length of time to do that.

A summary journal entry summarizing the transfers—

in other words, after you determined how much was going to be transferred all you would do would be to prepare a journal entry in which you would show that Job 381 was being charged. It would be a debit to Job 381 and a credit to the other forty-seven jobs. That would be posted at the end of the (289) period to show that it was an adjustment. If it necessitated any adjustment to the general books, to Surplus Account, as it might well have in this case when some of the jobs were open, there would be a separate adjustment to Surplus. If more contracts were closed it would only affect the job cost ledger; it would only be posted to those forty-seven job. Actually what it would do would be to eliminate the manual work of rewriting these records.

Q. Did he tell you when this job of changing the records was done?

A. Yes, we discussed that and tried to fix the date as best we could fix it. It was started in March and completed sometime in July or August.

Q. Of what year?

A. That would be 1953. Now, I don't know that he worked on it constantly throughout that period, but the first records that were changed were the time cards, then the labor summaries, and finally the job cost ledger, starting in March of 1953, according to Mr. Mastros.

Q. Where is the job analysis sheet which you had here? This long sheet which is labeled G-20, you say is called a job analysis sheet?

A. No, that is a schedule of transfers which Mr. Mastros prepared for me which indicates the forty-seven different (290) jobs from which labor, engineering labor, was transferred to 381E.

Q. Take your left hand, will you, and hold that so the jury can see, and tell me what are these numbers down in the very lefthand column?

A. Well, on the extreme left is the job number, and you find down here part way—well, you don't find—Job 381E.

is the last job, next to the last job, on the second page. That is the total over there of $77,000. Now, you find the jobs listed in the first column here. These are the job numbers as reflected by Espey's job cost ledger.

Q. What does it mean when it says "From Job" at the top?

A. Well, it means it was transferred from those jobs listed in this column to Job 381E.

Q. Just pick an example, if you will.

THE COURT: Is this the analysis he prepared for you?

THE WITNESS: Mr. Mastros? Yes.

MR. FOGWELL: For him.

THE COURT: All right.

MR. FOGWELL: That is my understanding.

THE WITNESS: We will take Job 260—that is the fifth job listed there. It then shows the contract number; it shows it is a fixed-fee job. It shows in the fourth (291) column that it is a completed job.

BY MR. FOGWELL:

Q. You mean the fourth vertical column?

A. Fourth vertical column.

Q. You are following the fifth horizontal column right across?

A. That is right. Going from the fifth column, August, 1950; sixth column, September, 1950, all the way cross to May, 1952. The May, 1952, if I can see this here, shows that the total of the charges, the total of the transfers made from Job 260 to Job 381E, amounted to $7,458.41, and by

looking at the extreme column on any particular job listed in the extreme lefthand column you can find out in the extreme righthand column how much engineering labor was transferred from that particular job to Job 381E.

Q. Well now, when did you have the first conversation or interview with Mr. Mastros, approximately?

A. Well I first saw Mr. Mastros on November 10, 1953. On that occasion I went up and called on Mr. Pinsley. I told him the nature of my inquiry. He informed me that Mr. Mastros had executed an affidavit acknowledging that he caused the records to be changed, and that the affidavit together with all the books and records were in the office of Mr. Arthur Richenthal who at that time was the corporation's (392) general counsel.

Mr. Pinsley stated that he did not care to discuss the matter with me except in the presence of Mr. Richenthal. I informed him that since Mr. Mastros had acknowledged responsibility for the transfers or the alterations I desired to talk to him. He called Mr. Mastros in at my request, and also called Mr. Richenthal. Mr. Richenthal informed me that he desired to be present when I talked to Mr. Mastros. I informed Mr. Mastros of Mr. Richenthal's desires. Mr. Mastros said he would not talk to me except in Mr. Richenthal's presence. I thereafter informed Mr. Richenthal that I would like to talk to Mr. Mastros at the earliest possible date.

The next time I saw Mr. Mastros was November 12, 1953, at the offices of Espey. I was there from 10:30 to 12:30, at which time Mr. Richenthal and Mr. Blansdell, who at that time was associate counsel, both indicated to me that they had afternoon appointments, and therefore they had to terminate the interview. During this interview we discussed generally what had happened, and Mr. Mastros related in a general way what I have already testified to as to the date that he had these records changed by most clerks.

Q. How many interviews, in all, did you have with Mr. Mastros?

(293) A. Well, at the termination of this interview on November 12, on the following day I asked Mr. Richenthal, who was not representing Mr. Mastros but was representing the company, and because Mr. Mastros was controller of the company, he desired to be present. Mr. Mastros did not desire an independent counsel.

I informed Mr. Richenthal because of the position he had taken that I would like Mr. Mastros to prepare the schedule which I have just discussed. That was on the 13th. Thereafter for a period of about ten days I had several contacts with Mr. Richenthal. He stated Mr. Mastros was still preparing the schedule. I told Mr. Richenthal that I desired to review the books and records of the company and would, of course, desire to complete the interview with Mr. Mastros. He stated that he had the books and records at his office and that before I looked at them he would like to have an opportunity to look at them and to review them with Mr. Mastros. He said that this would take several days.

On about the 20th of November I was informed by Mr. Richenthal that the schedule which is G-20 would be completed by Mr. Mastros by the morning of November 23, and that he would make an appointment to have Mr. Mastros present for an interview on that date. On that date we (294) again interviewed Mr. Mastros in Mr. Richenthal's office in the presence of Mr. Richenthal's associate, Mr. Irving Moss and Mr. Jack Gross.

Mr. Gross was an associate of the C. P. A. firm of Kalish-Rubinroit, and he desired to be present because of the fact that Kalish-Rubinroit were Espey's outside auditors. We discussed this matter on that particular date from approximately 10:30 until approximately 12:30, and again from approximately 2:15 until 6:30 or thereabouts. We attempted to prepare a longhand signed statement, but the interview was terminated at the request of counsel. We thereafter prepared a typed statement which was signed by Mr. Mastros on November 24. We saw Mr. Mastros on

that date about 3:30 in the afternoon in Mr. Richenthal's office. Again Mr. Irving Moss was there.

We presented the signed statement to Mr. Mastros. We presented the statement we had prepared which was then unsigned. Mr. Mastros took the statement at Mr. Richenthal's request and went out into another room and read the statement from about four o'clock until about 5:45 or six o'clock, then he came back into the room.

The statement was already signed. Mr. Richenthal and Mr. Moss had been in conference with him in the adjoining room. The alterations were made to the statement. We dis- (295) cussed the alterations. Mr. Richenthal stated it was late and that was the only statement Mr. Mastros was going to give, and that is the statement which he signed. As I say, it was already signed, and it was signed twice in our presence, because it had already been signed once by him.

That was the only—well, it was not the only time—on two other occasions I did talk to Mr. Mastros. We had asked for the books in November of 1953. We got some of the books December 9, 1953, at the office of Raphael Koenig. Mr. Koenig ——

Q. How much of a delay was there in getting the books?

A. Well, I had indicated a desire to review them on November 10. We finally got some of them on December 9. I did not get all the books that I wanted. I made further requests. They were made available at the office of Raphael Koenig who was then associate counsel. I requested additional books. We had conferences with Mr. Richenthal, and according to them with officials of the company. The final result was that Mr. Koenig requested a conference with the Assistant U. S. Attorney in the Southern District of New York who at that time was handling the case. I attended that conference early in January of 1954, and by January 21, 1954, I had most of the books that I had previously asked for.

(296) Q. About two months after?

A. It was from November 10 to January 21 before I had them all.

THE COURT: I think we will take a recess for a few minutes.

(Recess.)

BY MR. FOGWELL:

Q. Mr. Miller, did you get into the progress report in this case?

A. Yes, I reviewed a copy of the request for progress payment which was made in connection with this contract. It was file dated January 12, 1953, which is just a few weeks prior to the termination of the claim. It covered a period ending December 31, 1952, which is about a month and a half before the contract was terminated.

Q. Mr. Miller, how long have you been a federal agent?

A. Fifteen years.

Q. Have you made a number of investigations in that time?

A. Oh, yes, certainly.

Q. In general, in this case, what kind of cooperation did you get?

MR. KOSSMAN: I beg your pardon.

(Question read.)

(297) MR. KOSSMAN: I won't object. If you want to ask that question, all right.

THE WITNESS: I would say, generally it was not too good.

BY MR. FOGWELL:

Q. What do you mean by that?

A. Well, No. 1, there were certain delays in getting the records, from November until December, and again into January.

THE COURT: In that question do you mean the cooperation of this defendant? Anything else would not be ——

MR. FOGWELL: That is right.

THE COURT: Not from the corporation, or the company, or anybody else, but from this defendant, is the question.

BY MR. FOGWELL:

Q. Mr. Miller, one last question: Was there anything in this whole set of books ——

THE COURT: Let us finish this.
Did you get cooperation from this defendant?

THE WITNESS: I cannot say—I cannot answer that by yes or no. I can only say that when I talked to him he cooperated, but he was controlled by the company. He was performing other work for the company. I was working on the (298) audit away from the company, at their request, not mine, and occasionally things would come up in connection with the books which I naturally would like to discuss with Mr. Mastros. That was not possible. On two occasions I wanted to discuss the records with him. On one occasion it took approximately eleven days to get him to come down to the attorney's office. On another occasion it took approximately four or five days. Now, I cannot

attribute that to non-cooperation of Mr. Mastros. The company officials said he was busy on other matters, he was working on other price or determination claims, he was assisting outside auditors who had come in to straighten up the books.

THE COURT: All right; I guess that is enough.

BY MR. FOGWELL:

Q. Did you go over the hardship claim with him?

A. We discussed the hardship claim with him. He, of course, did not prepare it; it was prepared by his predecessor. It was prepared by someone prior to his time. That was one of the reasons he gave me for making the transfer of the engineering labor to this contract—the fact that he was aware of what was said at the hearings.

Q. Did he tell you when he first went to work for Espey?

A. The specific date was sometime in July or August of (299) 1952.

Q. Mr. Miller, in your whole investigative review of the records was there anything you found to justify charging or attempting to charge some $77,000 ——

MR. KOSSMAN: I object to that, if the Court please.

MR. FOGWELL: Well, I will withdraw it.

THE COURT: Yes; I think that is correct.

CROSS-EXAMINATION.

BY MR. KOSSMAN:

Q. I have a few questions—because you have given a very excellent resume. No. 1, were any original records in

this case destroyed by Mr. Mastros, or concealed, that you know of?

A. I think he told me that he must have thrown out the original job cost ledger from July 1 of 1951 on. That original job cost ledger from July 1, 1951 on, was missing. I believe he said it was in a desk drawer and had been thrown out either by him or someone else.

Q. He told you he could not find it; is that correct?

A. He said he could not find it, and I think he said he must have thrown it out.

Q. But he told it to you; right?

A. He told it to me. It was not a clear-cut statement.

(300) Q. Now, how about any of these cards, were any of those missing?

A. The cards were not missing; they were located.

Q. Yes, but none of them were missing?

A. None of them were missing; they were just changed.

Q. No. 1, what difference does it make in terms of this particular case if engineering work had been done on the particular job whether the figure, if it is to be determined, $80,000 on a 2 per cent basis, is arrived at by correcting and altering time cards of other jobs or making a journal entry, what difference does that make in this particular case?

A. Well, just this: I think it conceals a material fact from the Air Force auditors as to the basis upon which this information, this engineering labor, was computed. The schedule of accounting information says it is based on actual cost. It says engineering is allocated to specific jobs where possible; otherwise it is allocated as part of the overhead, general overhead. Now, this was a material fact which was not disclosed to the Air Force. The Air Force would have reviewed any journal entry and could have reached a proper conclusion as to the propriety of the charge.

Q. Suppose he had put down $80,000 in a journal entry?

A. Then they would have discussed it with him and they

would (301) have come to a conclusion as to whether it was correct or not.

Q. But weren't these records available?

A. These records were available and on the face of them they appeared to be legitimate, while actually it didn't represent a distribution of engineering labor in the normal course of business.

Q. Do you know—are you prepared to say under oath—that there was no $80,000 worth of engineering done on this particular job, or maybe more; that is the question.

A I am no more prepared to say that than he is that $80,000 was incurred on the job.

Q. Wait. I beg your pardon. With all due respect to you, I just wanted to get your side. You are not prepared to say that?

A. No, I am not.

Q. You cannot say that; correct?

A No.

Q. Your last question—if the fact had been disclosed that it was an estimate, if the Air Force had been put on notice of that fact, they could have done what someone else should have done, and that might be to determine whether that engineering labor had actually been incurred.

Q. But you have been in court; you know Mr. Mastros (302) identified this job with an E, engineering; he kept the records; he explained to the various auditors tha he was increasing the original amount because he thought it was incorrect; he told Mr. Goldenberg that they could get an Army engineer and actually check; isn't that correct—what he did?

A. An Army engineer, I believe, would have considerable trouble determining how much engineering labor actually had been incurred.

Q. Of course, this was only a tentative appraisal. If it could not be sustained then it would be eliminated; correct?

A. I don't know.

Q. Well, do you mean to say that if it could not be sustained ——

A. If it could not be sustained—the way it was presented, the Air Force was precluded from the possibility of determining whether it was right or wrong.

Q. But as a practical proposition it was not precluded because they were conscious and they were made aware of this incongruity.

A. They were not conscious of the fact that the time cards had been changed and that the labor was something other than labor that was distributed in the normal course (303) of business. They did not know that it was distributed eighteen or twenty months later on this particular job. They did not know that it formerly was distributed to commercial jobs.

Q. By the way, talking about the commercial jobs, am I right that the whole fourteen commercial jobs only amounted to—how much? $443.66?

A. Possibly.

Q. I have the figure. Well, let us get the facts.

A. O.K.

Q. Well, $443.66. Right? If it will help you by number—353, 360, 361, 373, 384, 390, 391, 394, 396, 397, 400.

A. You mean the total of the transfers, not the value of the contracts themselves?

Q. The total was $443.60?

A. Well, that just merely points up the manner in which the transfers were made.

Q. Now, is this the fact: Did you interview Michael—what's his name—Barbarone?

A. No, I did not.

Q. Well, he was the fellow in charge of the cost department.

A. You are asking why I did not interview him?

(304) A. Mr. Richenthal said that I should not interview anyone except in his presence.

Q. Is that binding on you?

A. The Assistant United States Attorney handling the case in New York at that time said that I should go along

with his views. We had attempted to interview the Pinsleys. I had attempted to interview them separately. They had refused to be interviewed separately. The assistant handling the case in New York said that in view of their attitude he would wait for grand jury action.

Q. Was there any grand jury action against the Pinsleys?

A. No, there was not. I believe they were called, though. I believe they were called.

Q. They were called?

A. Before the grand jury.

Q. Did they testify before ——

A. I don't know.

Q. You don't know if the Pinsleys testified before the grand jury?

A. I was not in the grand jury.

Q. Do you know whether they claimed their privilege?

A. I think they may have.

Q. By the way, he went before the grand jury, the defendant?

(305) A. He did.

Q. Was he told at that time that he was the object, that he would be indicted?

A. I don't know what he was told.

Q. Oh, you didn't tell him anything?

A. I told him—I informed him of his right to counsel before the interview. I informed him that even though Mr. Richenthal was representing the company and was advising him as a friend, he had a right to counsel of his own choosing. He declined to obtain an outside counsel; he was willing for Mr. Richenthal to advise him.

Q. Now, you testified before this grand jury; correct?

A. I did, yes.

Q. And Mr. Mastros testified before this grand jury; correct?

A. That is right.

Q. And no other persons testified before this grand jury? Correct?

A. I don't think so. I have been away for a while.

Q. Well, don't you know that the Pinsleys refused to testify because ——

A. I heard they did.

Q. What is that?

A. I heard they did.

(306) Q. Because they might incriminate themselves?

A. I heard they did.

Q. And he did not have to give you a statement?

A. Certainly not. I told him he did not have to.

Q. Now, you say he spent twenty, thirty, forty days directly or indirectly with you or working for you and working on these projects while he was employed with the company?

A. I could not say. I will say this: From November 13 to November 24 or 23 when he made available this schedule, supposedly he was working on it. I have no reason to doubt it. But I do know after that, that when I tried to get him to review the books with me, discuss the books, he was mixed up with a lot of other company work. That is approximately a 10-day period. Other than that he did very little for me. He came down—I talked to him on one occasion for two hours and on another occasion for a very few hours. Other than that one interview on the 23rd and half an afternoon on the 24th of November and two hours on November 12, so I would say thirty to forty days, no.

Q. All right, how much more could he do for you? He gave a statement. He went before the grand jury. Is there anything you feel he can do for you that he has not done?

A. I would like to have worked at the company in an office (307) next to his where he would be accessible readily to answer any questions.

Q. Did he keep you from doing that?

A. No, the company did.

Q. Oh, the Government?

A. The company. The company.

Q. Oh, the company.

A. The company.

Q. But he didn't?

A. No.

Q. He is no longer with the company; right?

A. I know that.

Q. Now, I have been informed that the labor corrections in the Espey Company as a practical proposition—leave out the words "practical proposition"—were actually made by changing the cards and all related cost records, that they never made journal entries for such corrections; is that correct from your investigation?

A. They made journal entries in 1951.

Q. I am talking about for the corrections.

A. They made journal entries to correct in 1951.

Q. For labor?

A. Yes, there are a few in there; not many.

Q. And before ——

(308) A. None in 1952 or 1953.

Q. Before he came there they were making labor corrections on cards?

A. I don't know.

Q. Well, you examined the cards, didn't you?

A. It is pretty hard to determine whether those cards had been changed or not. Some are noticeable; others are not. The change—you have no way of knowing whether the change was made at the time it was originally recorded or a week later or eighteen months later, as in this case.

Q. Well, couldn't you tell by handwriting experts?

A. No, I couldn't. What I am pointing out, it could be a legitimate change. Employee Joe Brown might put down inadvertently Job 260; he might have worked on it yesterday; he might erase it and put down 259 today. That could be a legitimate change.

Q. I want to put it to you this way. Here is an item put down for engineering time, $80,000, and it is agreed that if there was $80,000 worth of engineering time spent on this $1,300,000 contract that there could be another $80,000 for

overhead. That seems to be accounting. I cannot understand why there should be, but at least that is conceded. Now, did you make any attempt to interview any of the subcontractors who were doing some of the work, (309) who would have told you that there was tremendous engineering work done in this particular project, this particular item? I am not talking about other items. Did you make any effort?

A. We interviewed a few subcontractors.

Q. In reference to this particular item, Job 381?

A. In reference to claims which they had submitted. In other words, when a contract was terminated the subcontractors submitted claims and their claims were made a part of this over-all ——

Q. What did you learn from them? Did you interview Mr. Kuhn and Mr. Cardwell who were subcontractors?

A. What firm, please.

Q. Parts Products Corporation.

A. No, I did not.

Q. Well, that was the biggest subcontractor on this job; why wouldn't you have interviewed them?

A. We were primarily interested in this one aspect of the case. We conducted other investigation pertaining to costs submitted by the Saratoga Division, and so forth. This was the main ——

Q. Wasn't it important to know whether there was really engineering work done and not simply rest ——

A. You would not normally ——

(310) Q. What?

A. To answer that question you would not normally expect the subcontractor to perform engineering work for the prime contractor. This subcontractor you would normally expect would perform work in connection with sub-assembly work after Espey had engineered the original model. Further, the work from subcontractors, the billings of it, I believe in this instance, were picked up as material, purchased parts; it was not picked up as labor, material and

overhead. It would not be characterized as engineering labor; it would be something separate and distinct from what we are talking about.

Q. Maybe I did not phrase the question correctly. If you had talked to the subcontractors—well, I will state as a fact, because they are people, that these subcontractors were in touch in order to get the parts that they were making for the prime contractor, with engineers actually employed by Espey on this particular job. Now, did you try to follow that lead out? Whether what I just stated is correct or not, did you talk to any of the engineers in the Espey Company?

A. I personally did not.

Q. I mean, and ask them if they did any work on this job.

A. At the time, we were prohibited from talking to any (311) employees; we could only obtain the names through the company. Now, I requested a list of engineers. I never got that list of engineers from the company. That is my recollection. I requested it and followed it up several times.

Q. Of course, you were supposedly controlled by the United States Attorney in New York in this investigation?

A. I beg your pardon; I was what?

Q. Were your activities limited and controlled by the United States Attorney in charge of this case in New York?

A. Just so far as legal matters may be concerned, a question of someone making a request such as I have just mentioned.

Q. At any rate, as you just said, you don't know whether there was a dollar's worth of engineering work done here or $80,000 worth; is that correct?

A. No; originally I would have interviewed the engineers had I been given ready access to the records.

Q. Did Mr. Mastros keep you from interviewing the engineers?

A. I was not able to deal with Mr. Mastros; I dealt through attorneys representing the company who told me when I could see Mr. Mastros.

Q. Didn't the grand jury issue subpoenas? Don't you know anything about that?

(312) A. We discussed the issuance of a subpoena.

Q. And nothing ever came of that?

A. No, unfortunately.

Q. Tell me this: Was there some other reason that you believe made the Pinsleys and their accountants and all these people, others involved with this $25,000,000 worth of contracts—do you believe that that was one of the reasons? And today Mr. Pinsley is refusing to testify on the grounds it may incriminate him? Has your investigation touched those fringes, that there may be a basis for the self-incrimination?

A. It has touched the fringes that they may also have known that this statement was ——

Q. I am not talking about this statement; I am talking about this $25,000,000 of other contracts.

A. No, we did not go into other contracts.

Q. You did not go into that?

A. Frankly, we had enough on this one. I might add that we would not ordinarily go into the other one without some basis for it. We would not make an over-all investigation.

Q. The only one ——

A. We had an allegation or good reason to believe that something was wrong in connection with this particular (313) contract; that is why we went into it. It would not follow that we would check every contract that they had.

Q. But if the people connected with the Air Force or Quartermaster or the services had reported to you other delinquencies then you would have followed through; correct?

A. If they were of the nature that we would follow through on.

Q. And, of course, if there was something wrong and they never reported it, you could never investigate it; right?

A. Not unless someone else reported it. We don't get all our information from the Air Force.

Q. Am I correct in saying the Pinsleys didn't know how far your investigation might go? You didn't give them a preview, a schedule, of what you were going to ask them?

A. No, we told them we were interested in this one contract.

Q. Now, let us come back to the defendant—something I forgot. Now he also told you—am I right—that in his statement to you at that time that it was not only a question percentagewise from the contract, but now I am quoting the exact words, it was my belief that engineering actually was involved on this contract because I had attended the hearing which was held in connection with Espey's hardship claim, in Washington, D. C., in September, (314) 1952, and at that hearing I heard Nathan Pinsley remark that there was engineering on this job.

Didn't the defendant tell you that?

A. Yes, it is in the statement.

Q. Yes, but the jury doesn't know it.

A. I brought that up a few minutes ago, I believe, if you will recall.

Q. But originally I thought you had limited it just to the percentage basis. It is true?

A. It is true. It is true.

Q. Then what happened? The truth—did you check up the actual testimony at that hearing with every person there?

A. I have seen it at one time or another.

Q. Wasn't that important?

A. But no figures were submitted; no support was given to those statements.

Q. But didn't he hear the president of the company say, "I have spent $400,000 in cash and a lot of engineering"?

A. The $400,000 I believe refers to materials and not engineering.

Q Wait. Cut it short. Let us get the exact words.

THE COURT: We will have to recess.

We will recess until two o'clock. Ladies and (315) gentlemen, do not discuss this case with anyone nor permit anyone to discuss it with you.

AFTERNOON SESSION.

RICHARD A. MILLER, resumed.

CROSS-EXAMINATION (CONTINUED).

BY MR. KOSSMAN:

Q. You have read the transcript once; is that correct?

A. I saw it a couple days ago.

Q. I will read it. Here there was a statement made by Mr. Morris Pinsley, "We have well over $400,000 in cash invested in the job not including the engineering time which we had to put in in order to get into a position where we accomplished the job without the Government's drawing." Now, am I correct in saying, first, that the defendant heard that because he was present ——

A. Yes.

Q. —and secondly he told you that, that he was at the hardship hearing?

A. He was at the hardship hearing. He made no reference to what you are referring to there.

Q. But this took place at the hardship hearing?

A. That is right. That is right. He told me he was at (316) the hardship hearing.

Q. He told you that influenced his judgment?

A. That is right.

Q. In figuring out that there could not be the $900 engineering time?

A. That is correct.

Q. Isn't that correct?

A. At that time I didn't know what transpired at the hardship hearing. He didn't tell me what transpired.

Q. But you verified the fact that he was at the hearing, in your investigation?

A. That is right.

THE COURT: He said, "Yes."

BY MR. KOSSMAN:

Q. The next thing: At this particular hearing that took place the following statement was also made by Mr. Morris Pinsley in his presence, "We went to the trouble of going ahead and building this thing and giving it to the laboratories where at the present time it is approved, and up to this time we have not put in any charges to the Government for this development and engineering, but it was done just the same."

Now, I am reading what Morris Pinsley told the Board in his presence. Is that a correct set of facts, (317) that Morris Pinsley stated that, according to the transcript?

A. According to the transcript.

Q. Well, you read it. You never questioned Morris Pinsley? Well, obviously this is a correct statement.

A. That is a correct statement, according to the transcript. I will withdraw that it is a correct statement.

Q. Now, even though this is not a development contract, nevertheless Mr. Pinsley, according to his statement, said because it did not work we went ahead and redesigned it, and it is about 98 per cent interchangeable with the federal "something" except that ours works properly; is that correct? Was that the position of Pinsley at this hearing in this hardship business?

A. That is all I can say.

Q. According to the transcript?

A. If that is in the transcript—I don't recall that particular bit, but if that is in the transcript ——

Q. Well, was the position generally—they had a hearing —that what they had gotten from the Government—that is, from the Federal Telephone subsidiary of International Telegraph and Telephone—didn't work and they had to go and do their own development in order to make it worth; is that correct? Is that the sense of the (318) transcript of the hearing?

A. As I recall the gist of the transcript of the hearing is to the effect that there was a delay in the receipt of drawings, a delay in the receipt of the model, and whether or not they went ahead and designed it I have no way of knowing.

Q. Well, then, if you are not prepared to ——

A. I know at one point about November, 1951, they did get what they considered satisfactory drawings.

Q. Well ——

A. At that point I would assume that they began to make their model, at that point, and it was submitted about May of 1952, a few months later, but prior to November, 1951, I would assume that they probably did little or no engineering design work. There is another factor involved here and that is that Sam Sack, vice-president in charge of engineering—his time, and he was the one, I believe, who wrote the letters to the Signal Corps concerning the earlier drawings—his time would not have been charged to engineering as such; it would go into the overhead pool unallocated engineering.

Q. I am not talking about Sack or any particular person. When they got this blueprint and when they got the model from the Federal Telephone they were supposed to make models (319) of, am I correct the company claimed they could not make it. It leaked. The specifications were bad.

A. You are correct that they made those statements.

Q. Well, are those false statements?

A. I don't know.

Q. Oh, you don't know?

A. I don't know.

Q. Well, those statements were made and $600,000 was granted because of that situation by the Government; correct? On the hardship plea?

A. It was granted, yes.

Q. But why? Why was the six hundred—wasn't it granted as a result of what they said at the hearing?

A. As I recall, part of the basis of the hardship claim was the fact that they had been delayed in getting into production because the Government had not furnished them adequate drawings, in the first instance. Because of that delay the price increases which occurred after the Korean War started were such that they were going to lose money. There was a great deal of difference between the price of material and labor between the time they got the contract in June, 1950, and the time they were going to get into production a couple years later.

Q. Of course that is ——

(320) A. Now that is part of the basis for the award.

Q. You are correct in saying ——

A. The $600,000 is not because they engineered their own model; it is the increase in prices.

Q. That is true, but there was no $600,000 put in for engineering, either: it was only $80,000.

A. That is correct.

Q. That is correct; right?

A. That is correct.

Q. Now, it is true there was a delay. It is true prices went up. But they also had to make a new model, and they so stated, in order to make it work, and they had to spend money, extra money, that they had not even billed or put into any charges to the Government for the development and engineering at that time; isn't that correct?

A. Well, I don't ——

Q. According to the transcript?

A. According to the transcript, but I don't understand what they mean by the statement they have put in no charges to the Government. I would assume from that that

they charged Job 381 and they have not yet billed the Government for it.

Q. Well ——

A. Or that they might have another claim against the (321) Government, but they hadn't put in another claim for engineering as such.

Q. Well, let us put it this way: This defendant was present at that hearing; right?

A. Right.

Q. He heard what I am reading from the transcript; correct?

A. Correct.

Q. When he spoke to you, as one of the reasons why he knew that $900 or $2000 was too small, he gave this as one of the reasons.

A. That is one of the reasons.

Q. I don't know whether Pinsley is telling the truth or not.

A. I don't know either.

THE COURT: He said that. I don't know whether repetition is going to lend anything.

MR. KOSSMAN: I believe Your Honor is correct. That phase of it is over.

BY MR. KOSSMAN:

Q. Now, next, none of these cards, or practically none of these cards, are signed by the engineers; is that correct? Not the ones you have in your hand?

A. I don't think any of them are signed by the engineers. They have a typed name on there; they don't (322) sign them.

Q. Now, didn't the defendant, when he came in—didn't he, when he saw the situation—he is coming in, in May or June, 1952—didn't he create a new card in order that the

employee would have to sign so there would be a record of the work done? Didn't you see this? Did you ever see that?

A. I can't say I did.

Q. Can you say you didn't?

A. I don't think I saw it.

Q. You don't think you saw it?

A. They weren't in use during the period that we were reviewing.

Q. But, of course, they weren't; I am not talking about that.

A. I didn't review anything subsequent to the period that this contract pertained to. I would have no reason to see a new card that he introduced.

(A blank time card was marked Exhibit D-4.)

BY MR. KOSSMAN:

Q. Let us go back to that journal entry business. Am I correct in saying that in 1950 or '51 there was only one journal entry for the year and that was for less than $200?

A. There weren't many. There were not more than one or (323) two, and you are probably correct.

Q. Well, I am stating that to you as a fact. Would you say that is approximately the truth?

A. That is approximately correct.

Q. And that was the history, of course——

A. That was for the year ending June 30, 1951.

Q. That is right.

A. It merely served as an indication that if they had any transfers at that particular time, at least, why they followed the practice of using a journal entry.

Q. That is right, but that was the history when this defendant went to work; right?

A. That is correct.

Q. Am I therefore correct in saying that all other cor-

rections were made by the accounting clerks directly on the cards and related papers? In other words, the fellows who actually did the work themselves, the engineers, they didn't even bother signed or filling in the cards, and what not, that was done by accounting clerks?

A. I don't know who made the distribution.

Q. Well, they weren't signed by the people who actually did the work?

A. It is not signed. I would assume the employee or the supervisor would do it. I don't know who did it actually.

(324) Q. Did Mastros tell you he found out that the cost clerks themselves were preparing the job cards for the engineers and he put a stop to that practice after he joined Espey?

A. No.

Q. Are you sure he didn't tell you that, or you don't have a recollection of him telling you that?

A. I am sure he didn't tell me that.

Q. Now, coming back to what he told you back in 1953, and of all the people associated with the concern he was the only one who went and testified before the grand jury, is that correct—to your knowledge?

A. To my knowledge, that is correct.

Q. He told you at that time that he had graduated from New York University with a degree in accounting after going to school at night for about six or seven years?

A. That is right.

Q. He told you, and you verified it, that he was in the military service?

A. That is right.

Q. As a rifleman?

A. I don't recall what he was in, what branch.

Q. Did you know that during that particular period he was looking to leave Espey and was looking for another job?

A. He told me nothing about that.

(325) Q. Oh, you had no information. As a matter of fact, you have no recollection or no knowledge that he said

anything about it even in May, 1953, that he was answering ads and going to employment agencies trying to leave this place? That never ——

A. He never told me.

Q. Oh, he never discussed that with you?

A. No.

Q. He told you in his statement that he didn't have any idea of what jobs were affected by the transfers until he had made the analysis of such transfers at your request; is that right?

A. That is right.

Q. And that because I then believed that the existing books were incorrect I instructed the above mentioned three individuals to correct the weekly time cards and payroll summary sheets and cost ledgers from which transfers were to be made—right?

A. He made that statement.

Q. Yes, he told you?

A. That is right.

Q. You knew, of course, that even way back he had told the Government man who came around about the hardship case, Mr. Weiss, that it was being raised from $2300 to $75,000; (326) did your investigation disclose that?

A. My investigation disclosed that he told Mr. Weiss—not he, but Mr. Rubinroit in his presence—that the job cost ledger sheet as of April 6, which had not yet been changed—April 6, 1953,—was understated to the extent of $75,000 because other costs had been accumulated on analysis sheets, because it was the practice not to distribute preproduction engineering costs until production was initiated. My review of those—or my subsequent interview with him indicated that that was not exactly the way it happened. In so far as I could determine there were no analysis sheets and the transfers actually came from other jobs rather than analysis sheets.

Q. Well, when you put in a hardship claim there is generally an audit, isn't there, for any of this type of contract?

A. There is an audit.

Q. Am I right?

A. Yes, there is.

Q. Now, I would like to know this: How was the Government harmed? How was the Government cheated? How was there any attempt to harm the Government? How was there any attempt to cheat the Government? If actual engineering work has been done in that amount, let us say $75,000, and it is not (327) recorded on a docket, on a journal entry, which the practice of the company has been never to record by journal entry, although, as you say, it might be bad accounting practice, but is done by change on cards, and all that evidence is retained and disclosed to the Government. How is the Government harmed?

A. Well, I have not been able to determine that engineering labor to the extent of $80,000 was performed. The books themselves indicate that the contrary was so, that it was less than $80,000. The progress payment request was submitted January 12, 1953, in which he certified that the total labor, both engineering and production, up through December 31, 1952, from the date of the contract was only thirty-eight eighty-two. Now, this account goes back, dates back, to August, and comes through only to May, 1952, and that now has $77,000 in it. Now, if—if he had disclosed what he had done, either by a journal entry or orally, then some branch of the Government would have been in position to be able to make a factual determination of whether or not the labor actually had been incurred. The time cards indicate, the ledger summaries indicate, the job cost sheets indicate it was incurred, but we do know that was done eighteen, twenty months after, and that they would have no basis for going back and interviewing, say, the engineers, (328) and even getting an Army engineer in to estimate how much it was. Without knowing the basis upon which that was built up, naturally they would be justified in assuming that the basic records do support it, but they didn't know the basic records had been altered as late as March, 1953.

THE COURT: I think we are getting pretty far afield here. The criterion is not whether he feels the Government is harmed or not, and I don't think it is a fair question to pose to the witness.

BY MR. KOSSMAN:

Q. And you because of the lapse of time never went around to the engineers to find out specifically if they did put in $80,000 worth of time; is that correct?

A. I tried to get a list of engineers; it was never furnished to me. I know who a few of the engineers were. We have interviewed a few of the engineers—not myself. One, as I recall, said that he did not work on this contract at all, but that is not conclusive in the least.

THE COURT: It is hearsay, too, and I don't think we will hear it.

BY MR. KOSSMAN:

Q. Do you have any evidence that this defendant got any money from Pinsleys for doing this outside of his salary?

A. No, sir.

(329) MR. KOSSMAN: That is all.

THE COURT: Anything else, Mr. Fogwell?

RE-DIRECT EXAMINATION.

BY MR. FOGWELL:

Q. Mr. Miller, this particular hardship hearing—Morris Pinsley was the lawyer?

A. He was the lawyer for the Espey Company.

Q. Do you know when he made these statements whether he was under oath?

A. That I don't know.

THE COURT: Is that all, Mr. Fogwell?

MR. FOGWELL: I have a couple other questions. That is all.

THE COURT: You are excused. Next witness.

MR. FOGWELL: Would Your Honor indulge us for just a second?

While we are at the point I would like to offer all Government exhibits, some twenty-three of them.

MR. KOSSMAN: Normally, I would like to examine each one, drawings, et cetera, but in the posture of this case I have no objection at all to the admission of all Government exhibits.

THE COURT: They will be admitted.

(Government's Exhibits 1 to 23, inclusive, (330) received.)

MR. FOGWELL: I think that is all, sir. The Government will rest.

(Government rests.)

THE COURT: Mr. Kossman, you may proceed.

MR. KOSSMAN: I have some motions to make.

MR. FOGWELL: Perhaps it should be at side bar.

THE COURT: All right.

Again, ladies and gentlemen, counsel want to make a legal argument to the Court. Once again I think it better that you do not hear it. I will ask you to withdraw for a reasonable length of time until the defense is ready to present its case.

(Jury excused temporarily at 2:29 p. m.)

MR. KOSSMAN: If the Court please, I formally move for judgment of acquittal, and I would like to have permission to argue some of the legal points involved at this time.

There is an indictment in two counts. Count 1 charges that Mastros, hereinafter referred to as the defendant, did make and present, or cause to be made and presented, for payment and approval to the Department of the (331) Army, a claim against the United States for radio-telephone electronic units on behalf of Espey Manufacturing Company, Inc., in the sum of $1,128,875, knowing such claim to be false and fictitious, and that such claim was false, skipping, since defendant well knew that the total amount was substantially less than the amount claimed.

Well, first things come first, so—and, of course, that argument will apply to Count 2 also—there is simply no evidence of any false claim. There is simply no evidence of a false claim. If the F.B.I. fellow doesn't know, and I am referring specifically to the $80,000 for the engineering—if none of the Government people who have testified can say it is a false claim, how is the jury or anybody to say it is a false claim?

He is not charged with altering or tampering or changing pieces of paper; he is charged with submitting a false claim, and the first thing is to prove it is a false claim. I submit there is not the slightest evidence of that.

THE COURT: The motion on that score is denied.

MR. KOSSMAN: Secondly, there is certainly no evidence that it was done wilfully, maliciously. All the evidence shows that the reasons he gave were based on judgment. Differences in judgment do not rise to wilfullness. Certainly there was no purpose or motive.

(332) THE COURT: That may well be, but it is a jury question. This is in the proper forum. You may be able to persuade the jury to that extent, but that is for the jury to determine, laying it in the context of all the circumstances, whether or not it was wilful and with intent to defraud.

Motion denied.

MR. KOSSMAN: The next thing is that in truth there really is no false claim because—this indictment is fairly drawn in that respect, and a person can only be charged with what he is accused of, because there is no false claim of $1,128,000, which they say was substantially less, because there was a claim later filed for $1,308,000 on the same thing, so this claim is even less than the total claim on this particular transaction, so therefore that claim is not false, because the claim against the Government was not $1,300,000. Now, that is an argument based exactly on the charge. The man cannot be charged with one crime and convicted of another. That is Point 3.

THE COURT: Motion denied.

MR. KOSSMAN: The next argument is the question of venue. All this took place in New York, and there is no evidence whatsoever that he caused it to be made or presented in the Eastern District of Pennsylvania.

(333) I won't stop for the denial.

THE COURT: Mr. Fogwell, do you want to answer that?

MR. FOGWELL: I think it can be answered briefly by saying that the evidence shows in G-8 that this defendant wrote a letter from New York, sent it to Philadelphia here.

MR. KOSSMAN: It does not say it is sent. He just wrote a letter. Where is the envelope? There is no evidence of its having been mailed.

MR. FOGWELL: It is addressed to the Signal Corps, 18th Street, Philadelphia, Pa., allegedly sent from New York.

MR. KOSSMAN: You have the same situation that you had in the case that came from the Third Circuit where the person had to file an affidavit and there was simply no proof that he had failed to file it, the Valente case. The Government's proof is insufficient to sustain that. Yes, there is a letter, but is there any evidence that he mailed it?

MR. FOGWELL: In addition to that, on Page 3 it shows on here "Name of supervisory accounting official, George Mastros, Title Controller."

MR. KOSSMAN: That would show that it was a crime if anything was done in the District of New York.

MR. FOGWELL: My recollection is that the F.B.I. (334) man said that Mastros told him that he did do the job.

MR. KOSSMAN: He did do the job. Yes, he did the job. You mean he did the auditing; but this is a question of venue.

MR. FOGWELL: He prepared the claim.

MR. KOSSMAN: What's that?

MR. FOGWELL: He prepared the claim, and there is a letter over his signature saying, "Here it is."

MR. KOSSMAN: That is exactly the Valente case.

THE COURT: I will reserve the point. I want to check the record.

MR. KOSSMAN: The next point is that, strictly speaking, on Count 1 and Count 2 it is the same evidence to sustain the averments, and I submit, therefore, that only one of those counts should go to the jury if the Court is going to let any of them go.

THE COURT: No, I think Count 1 ——-

MR. FOGWELL: Incidentally, one more thing, on venue I think it ought to be brought out that Section 287 says, "Whoever makes or presents." I think he admitted he made it.

THE COURT: But you missed Mr. Kossman's point. He says there is no evidence except a covering letter of transmittal. He insists that under the Valente case you have (335) to have an envelope to show that it was mailed. It is the presenting in this district which gives it venue. He says there is not sufficient evidence here to warrant laying the venue in this district.

MR. FOGWELL: Your Honor has in mind that the Signal Corps man said it was from their original records in the old Penna A. C. Building, on 18th Street, here.

MR. KOSSMAN: Sure.

THE COURT: Yes, but that this defendant mailed it with a covering letter is insufficient.

MR. FOGWELL: Under the Valente case all he has to do is make it and have it end up here for presentment.

THE COURT: But how does it end up here, is the focal point of inquiry.

MR. FOGWELL: Under Section 1001 I think it is important, but under 287 I don't think it is important how it got here, because "Whoever makes or presents"—it doesn't have to be both; just one or the other.

THE COURT: Well, if he makes it in New York and does not present it here, this Court surely has no jurisdiction. I will have to review the record on that, since the question has been raised.

MR. KOSSMAN: Of course, the next point is that since there is no evidence or proof of a corpus delicti, (336) and under the rule any particular statements that he gave, these extra judicial statements, the law is that it is sufficient, according to the authorities, that there be independent of the confession substantial evidence of the corpus delicti. Aside from anything he said, there is no substantial evidence. All you have are two figures, a little figure and a big figure. Because of the little figure they say something was wrong. That is another point.

THE COURT: Motion denied.

MR. KOSSMAN: I think they are about all of the reasons that I have at this particular time.

Oh, further, there was no evidence of any representation upon these false statements that allegedly were made. It is based on a tender basis, and there was a discussion; no money was paid out, and therefore one of the elements is lacking in false representation. There has to be reliance. Here there never was reliance in this particular case. That

is spelled out from the very beginning of the case, so we say it is important in the over-all picture that there is no evidence of any false statement.

THE COURT: Motion denied.

MR. FOGWELL: Now, would Your Honor call back the jury.

(337) MR. KOSSMAN: In terms of budgeting our time, I have two witnesses that I am going to call, and I don't know—I had intended to call the defendant, but that might take a whole day. In terms of recapitulating the testimony we have gotten nearly everything that the F.B.I. fellow has stated. I want to ask the Court this. I would rather do it this way, because I don't know if I have the right to do it, but I will ask the jury whether they would like to hear from the defendant, because I had promised them originally in my opening speech that I would put him on. If they feel no, then I won't, but that will not involve any legal proposition.
May I?

THE COURT: No, I don't think you have any right to ask the jury.

MR. KOSSMAN: Do I have the right?

THE COURT: No, I don't think so—as to whether they wish to hear the defendant.

MR. KOSSMAN: Of course, I felt I had the right there, but I will make up my mind.

THE COURT: All right, suppose we go to about quarter of four today, since you won't finish today.

MR. KOSSMAN: I want to get rid of these two witnesses.

(338) THE COURT: All right, bring the jury in, please.

MR. KOSSMAN: Do I have to make an opening address to the jury at this stage? Am I allowed to?

THE COURT: No, you don't.

MR. FOGWELL: He made a stirring address before.

(Jury returned to the box at 2:42 p. m.)

THE COURT: All right, Mr. Kossman.

DEFENDANT'S EVIDENCE.

MR. KOSSMAN: Mr. Kuhn, please.

ALFRED S. KUHN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

BY MR. KOSSMAN:

Q. What sort of work do you do?
A. I have been in the communications equipment field since 1914.

THE COURT: Keep your voice up.

THE WITNESS: I graduated from college in 1913 and started in the radio business in 1914. I have been in it ever since.

(339) BY MR. KOSSMAN:

Q. Now, what do you do today? Who do you work for?

A. I am not working for anyone. I am working on some of my own inventions which take most of my time.

Q. Now, during the years 1951 and 1952 what sort of work were you doing?

A. At that time I was general manager of the Parts Producing Corporation which is a wholly owned subsidiary of M. Swift and Sons, of Hartford, Connecticut.

Q. Well, I will put it this way. I just met you—am I right—today?

A. That is correct.

Q. Would you tell the Court, His Honor the District Attorney, the agent, and the members of the jury, what you know that is essential to this particular case. That is the quickest way that I think I can get at it.

A. Well, I will go back a little bit.

MR. FOGWELL: If Your Honor please, I don't like to be captious, but that is a terribly general question, and as I understand this case so far, the defendant has stated that he charged engineering time for shop engineers, not subcontracting engineers.

THE COURT: We will hear it to the point that it begins to exceed legal bounds.

(340) MR. KOSSMAN: The district attorney can object.

THE WITNESS: I think I can tie it up for you. I am only interested in telling what I know. I was for many years with the Allen D. Cardwell Manufacturing Corporation, during which period the M. Swift & Company that I spoke of was, and still is, one of the largest subcontractors of Cardwell. Their subsidiary, the Parts Producing Corporation, decided in 1950 that they would resume their

operations which they had abandoned for a few years prior, and Donald Cardwell, the son of Allen Cardwell, and I were called in by the Parts Producing Corporation and we set up their Manhattan Division at the end of 1950. I was general manager of the Parts Producing Corporation, and Donald Cardwell was the chief engineer. We did work for many electronic companies, one of which was Espey Manufacturing Corporation. That is prior to the time that this project was brought to our attention.

Around November, I would say, or possibly early December, I was called in ——

BY MR. KOSSMAN:

Q. Of what year, sir?

A. Of 1951. I was called in by Sol Pinsley and Ed Robinson and Sam Sack. Now, when I say I was called in by the three (341) of them, Ed Robinson invited me down because I knew all these gentlemen before, and they told me ——

MR. FOGWELL: That is objected to—what anyone else told you.

THE COURT: It may not be hearsay. It is not offered for the truth of what is spoken. I think it is appropriate to see what eventuates from it.

MR. FOGWELL: I don't like to be captious. I think both Mr. Kossman and I have tried to refrain from any undue exceptions and objections in this case, but so far in this case we have, as I see it, only two allocations of engineering activity, one in which there was none or virtually none, then we have evidence that the defendant charged a lot of time of Epsey employees; now if we are going to hear, as I rather suspect, some evidence that some subcontractor is alleged to have done some engineering, I don't think it is the slightest bit relevant.

THE WITNESS: No, that is not what I am going to say.

THE COURT: I don't think we ought to conjecture about it. We will wait and hear what the gentleman has to say, and then, if you wish, you may move to strike.

THE WITNESS: I must ask your indulgence. I (342) have only met Mr. Kossman here ——

THE COURT: All right, Mr. Kossman.
You were called in to Espey.

THE WITNESS: That is right. I was advised at that time by these gentlemen that they had a contract with the Government on which they were having difficulty with the relays that they required for that job; they were fearful they would not get out in time; and they told me very definitely that they had a very substantial amount of money invested in the contract, both on purchases and a lot of engineering, and that they were about to go to the Government for help because they did not know what to do in connection with the relays. Sigma who was the supplier they had counted on—that is a concern up in Boston—apparently had advised them they could not deliver the relays in time to meet the schedule. They asked me if we would undertake to build these relays. We had two or three conferences, and we finally agreed on price, which I do not suppose is of any importance, but the amount of the order was about $450,000.

When I got the order I hesitated about accepting it because I noticed there was a 1950 date on the order. In other words, that was the date that the Government had issued the order, and this was the end of 1951, and I was (343) fearful of a cancellation, in which case, of course, we would have to go to court in order to collect what money we had put into the job, but it was explained to me that we did not have to worry about a cancellation, that the

worst that could happen would be that there would be a termination for the convenience of the Government, because the Government was at fault in that they did not deliver to Espey either samples or specifications that would meet the requirements.

MR. FOGWELL: Judge Ganey, I am going to object again. All of this is the worst kind of hearsay.

MR. KOSSMAN: He is coming to specific ——

THE COURT: Yes, I would suggest that he get to it.

MR. FOGWELL: He is just telling us what Sol Pinsley told him, and Mr. Kossman can subpoena Sol Pinsley.

THE WITNESS: When I first got the inquiry it was November or December.

BY MR. KOSSMAN:

Q. Are you coming to the particular point?
A. Yes.

THE COURT: Of 1951?

THE WITNESS: 1951.
I was given specifications which I took up in (344) careful study in detail with Donald Cardwell, and when we did accept the order finally we got a new set of specifications which were different, and when I questioned Sam Sack, who was the chief engineer ——

BY MR. KOSSMAN:

Q. Of what company?
A. The Espey Manufacturing Company—he explained to

me that there had been many changes during the period from the time they got the order until now, and this happened often over the next year. We kept getting the changes in specifications.

Q. You did.

A. We made changes in specifications, and I felt a little bit relieved that we wouldn't get a cancellation, because, if we got changes in specifications, the Government, I didn't think, would cancel without reimbursing us, and when we did get the cancellation or termination in February 1953, I believe it was, it was for the convenience of the Government and we were given to understand that we would be paid in full.

Now, during this period I had many occasions to speak to the Espey personnel, and they were telling me that they had nothing but engineering problems; they had to make trips to Fort Monmouth, they had to make trips to (345) Federal, they had these engineering discussions, and they were building up a mammoth engineering cost, I thought, so that they could not possibly come out whole on the job, and I heard this morning some figures mentioned of $80,000. Anyway, it so happened that I did all of the estimating and all of the bidding not only for Parts Production Corporation but also for the old Allen D. Cardwell Manufacturing Corporation, and I am fully conversant with costs, whether products costs or engineering costs, and with due respect to the opinions that have been advanced here I can tell you that $80,000 would not nearly cover the engineering charges on this job. It could not possibly.

Q. Why do you say that?

A. Unless it was charged to something else. Here is a contract, as I recall, that ran $3 million or more. It would have been simple if they had a prototype which had been approved and able to work, drawings and manufacturing drawings which they could follow, and even then I know that you always have engineering problems, particularly when it comes to electronic equipment. There are always

changes; there are always variations in materials you get. The temper of a piece of metal could be different. Engineers must be called in to see what changes must be made in manufacturing and technical procedures. So far as materials, (346) they cannot say because two years ago we made it, we can make it that way now; there are refinements which you cannot well determine. Materials that come in must be carefully inspected so that they can be properly used to get the proper end result, and on a $3 million contract even if there were practically no engineering required, I do not think $80,000 would be too much.

Q. Tell me this: Do you think $2000 is too little?

MR. FOGWELL: I think he should be qualified.

THE WITNESS: I will be glad ——

THE COURT: Yes, I think so, too.

MR. FOGWELL: I don't know what his qualifications are.

BY THE COURT:

Q. Are you familiar with this particular contract?
A. Yes.
Q. The engineering on this particular contract?
A. Yes.

THE COURT: He says "Yes."

MR. KOSSMAN: He was the chief subcontractor.

THE COURT: But he cannot go ahead and give his individual opinion of whether it ought to have been more (347) or not. I don't know that it is particularly controlling,

whether it was or not. It may weigh in the balance; I don't know, but it would seem to me he would have to give some proof, on this particular job, of the $80,000. He cannot say, "On a $3 million job I think it ought to be 2 or 3 per cent." That is alleged what this defendant said.

THE WITNESS: Well, I would say it would be 5 or 6 per cent.

THE COURT: Strike that out.

MR. KOSSMAN: May I have him? He is my witness. I say "my witness"—the defendant's witness. This man is qualified as an expert by his own standing, but more particularly he has had dealings with Espey during this particular time on this particular contract, and he is testifying from firsthand information. Now, it seems to me that in any false claim case the question is, was there a false claim made? I mean, aside from anything. If, in his experience—and, if the Court please, I must confess I didn't know what he was going to say, except that I was told by the defendant ——

THE COURT: I repeat, I do not think he is competent to pass judgment unless he can say that he was intimate with this, that he knew exactly what the costs (348) were. On a $3 million job, just because he did something incidental to it, or he made parts for it, he cannot say whether $80,000 is too small or too large. That is what the defendant did. That is why he is here.

MR. KOSSMAN: Well, if the Court please ——

THE COURT: No, I won't ——

MR. KOSSMAN: I am going to ask him a question.

THE COURT: All right.

BY MR. KOSSMAN:

Q. Are you familiar—can you tell the Court and jury why $80,000 engineering is more fair or more relative to this project than $2000?

A. Yes.

Q. Do you know why?

A. Yes.

Q. Well, tell us.

MR. FOGWELL: If Your Honor please, I would like to cross-examine on qualifications.

THE COURT: Yes.

THE WITNESS: Very good.

BY MR. FOGWELL:

Q. You say, Mr. Kuhn, you graduated from college in 1913?

A. That is right.

Q. You studied radio in college?

(349) A. That is correct. I graduated with a bachelor of science degree and took the first course that was ever given in this country in radio, which was given by Dr. Alfred Goldsmith.

Q. And you have been in the radio game ever since then?

A. That is correct.

Q. What phase of the radio game?

A. As an engineer in the beginning, and then administrative and executive capacity. Let me put it this way: I had complete charge of the operations of two or three companies during my lifetime.

Q. Do you have, sir, a degree in engineering?

A. Bachelor of science degree. I am a senior member of the Institute of Radio Engineers.

Q. My question is, do you have a degree in engineering, mechanical, electrical?

A. No.

Q. Have you ever done any estimating on a $3 million contract in the engineering line?

A. Definitely, yes.

Q. Where?

A. With the Allen D. Cardwell Manufacturing Company.

Q. When was this?

A. In the early forties.

(350) Q. I beg your pardon.

A. The early 1940's.

Q. Do you classify yourself as an electronics man, or as an engineer?

A. Both.

Q. Both?

A. That is right. I have done most of my work, as I say, in an administrative and procurement capacity rather than in a highly technical engineering capacity.

Q. What do you mean when you say "administrative capacity"?

A. I handle the general operations of a business; I was responsible for procurement and production problems that arose.

Q. Personnel?

A. Not personnel, but in the Parts Producing Corporation we were pretty close in personnel. Donald Cardwell and I worked together on that. I was Government liaison man for the Allen D. Cardwell Manufacturing Corporation.

Q. Did you ever see any of the engineers on this particular job in question?

A. Yes; frequently.

Q. Which ones?

A. Jack Petker.

Q. Who is he?

(351) A. Engineer for Espey Manufacturing. He was then. I don't know whether he is still with them. Ed Robinson, Sam Sack. There was another man by the name of, I think it was, Abe Cohn. I don't know whether he worked on this particular job intensively or not. I am inclined to feel that he had something to do with it, although I may be mistaken as far as he is concerned.

Q. What job are you speaking about?

A. This job which I heard referred to as the Job 381. I think the Government number on it was AN/GRA-6. I believe that was the designation.

Q. But all you know, all the information you have on this as to how much or how little work was done on it, and the type of work which was done on it, you say you got from both Mr. Sacks and Mr. Pinsley?

A. No, no; no, I got a lot of information from these other people, Robinson, and Petker. They were conferring with us very often—more often, I would say, with Donald Cardwell than with me, because as one engineer to another, why they probably exchanged more information than they would with me—not that they wouldn't want to, but there would be no purpose in doing it—but I can assure you that all these men told me that they were working very intensively on this job, and if anybody says $2000 for this (352) job ——

Q. Your company, I suppose, did something then, and prior to that time did other jobs for Espey as well?

A. Oh, yes.

Q. You knew the company; you had had previous connections with them?

A. With Espey, yes. That is, Parts Producing Corporation had previous experience with Espey.

Q. And subsequent activities with them?

A. Subsequently, also, we had orders from Espey on other jobs.

Q. In other words, you had jobs from them at this time, before, and since then?

MR. KOSSMAN: May it please the Court, this is a witness who is giving direct testimony which I feel the Government should have done, direct testimony as to whether there actually were—not even whether he thought there were, but whether there actually were—engineering charges incorporated on this particular Job 381, which the defendant estimated as $80,000, but even though it was down on the books for $2000. Now, he is going to testify specifically, and he has, that he has talked to engineers working on this particular problem—engineers working on this particular problem—their time has to be (353) allocated to this particular contract, and I think it is most imporant for the defendant to be able to introduce evidence, and I cannot understand the Government's objection, even if he didn't have the qualifications.

THE COURT: No, I sustain the objection unless this witness can state precisely that $80,000, or the figures which are allegedly presented to the Government, that that amount was performed on this specific job. If he can show that, if he knows that—and I don't know how he can, I will permit it. If he can show these figures on that specific job --and I would certainly want him qualified as to where he found the records to enable him to say that that much was expended—cannot represent his mere opinion whether 3 to 5 per cent ought to have been charged. That is an opinion, and he may be a competent man, but it does not further us in the determination of whether that amount was expended on 381. It may well be, as this defendant allegedly is supposed to have said, that it ought to be 3 per cent, but that is not our problem: Our problem is whether this was falsified to the extent of some $70,000 on this particular job.

MR. KOSSMAN: Yes.

THE COURT: I don't care whether the work was (354)

actually done—maybe more was done—it would still be false even if it were within a penny of it.

MR. KOSSMAN: Do you mean to say, Your Honor, if there was one cent missing that this would be a false claim.

THE COURT: It may well be. It would only go in mitigation. If I steal a penny, I am guilty of larceny under proper circumstances, and I am just as guilty as though I stole half a million.

MR. KOSSMAN: But the defendant is not charged with stealing anything.

THE COURT: I was giving what I thought of as a parallel analogy; it might not be too parallel, but it doesn't make any difference. If this witness can show that $80,000 was expended on 381 I will hear it; otherwise I don't want his personal judgment.

THE WITNESS: I would have no way of giving the exact amount. I can say this, though. There would have been probably three or four or five engineers working constantly on this at Espey over a period of a year that I was familiar with.

BY MR. KOSSMAN:

Q. How much does an engineer receive?

MR. FOGWELL: Objected to.

(355) THE COURT: Strike it out.

MR. KOSSMAN: How many were probably working

THE COURT: Take your exception. Let us move along. We won't get anywhere.

BY MR. KOSSMAN:

Q. Tell me, you had a subcontract from the Government, right?

A. From Espey.

Q. On this particular job 381 you talked about this problem with engineers who were working on this problem for over a year?

A. That is correct.

Q. How many engineers to your knowledge were working on this particular 381? To your knowledge?

A. At least three.

Q. At least three.

A. Constantly.

Q. Who were they?

A. Their names I don't remember.

Q. But you know at least three?

A. That is correct.

Q. For how long a period did they work in the year 1950? From the commencement of the contract would you say a year a year and a half?

(356) A. All I can say is this. Whenever I saw them and spoke to them, they told me, and at times I actually witnessed them making tests and experiments on this particular job. They told me they were working constantly on that job. I wasn't there forty hours a week; I couldn't tell. Mr. Donald Cardwell, as I say ——

THE COURT: Don't volunteer.

BY MR. KOSSMAN:

Q. Is there a theory whereby on a job of this nature, let us say $3,300,000—is there any particular theory among ac-

countants or engineers as to how much percentagewise is devoted to engineering on a specific job?

MR. FOGWELL: Objection.

THE COURT: Yes, I think that is well taken.

MR. KOSSMAN: Is the objection good?

THE COURT: Yes; he says he is not familiar with this contract.

BY MR. KOSSMAN:

Q. Well, in your own business—let us put it that way.
A. Yes, I am familiar ——

THE COURT: No, objection sustained.

BY MR. KOSSMAN:

Q. Did you ever know Mastros before this, before you saw him at Espey?
(357) A. Never.
Q. Did Petker ever tell you specifically that there had been at least $60,000 worth of engineering time placed on this project within a certain period?

MR. FOGWELL: Who?

MR. KOSSMAN: Petker, one of the engineers.

MR. FOGWELL: Objected to.

THE COURT: Objection sustained.

BY MR. KOSSMAN:

Q. Is there anything else you wish to tell the Court and jury in connection with this case?

A. If there is no objection, I can only say this ——

Q. Let's see.

A. From my experience in having made out all estimates for the companies I was connected with, I certainly know what percentages for various types of equipment are allowed for engineering.

MR. KOSSMAN: I think the Court has refused to allow you to state that.

THE COURT: Yes.

MR. KOSSMAN: So we won't have the pleasure of hearing it. Thank you very much.

CROSS-EXAMINATION.

BY MR. FOGWELL:

(358) Q. Mr. Kuhn, you say that you talked to one or more of these engineers and they told you what they were doing?

A. Oh, yes. Do you want me to be specific?

Q. You have been doing business with the Pinsleys on and off.

A. We did business with the Pinsleys in the Parts Producing Corporation from the early part of 1951, I would say, until '54 when they ceased their Manhattan operations, then the Parts Producing Corporation ceased their operations in New York, at which time I left them. See, they were a division of a larger company, and even up and until I left we were doing business with Espey continuously, not only

on this job but on other jobs, and, of course, on other jobs I met other engineers.

Q. You say you did not know the defendant Mastros when this job was going on?

A. I didn't meet Mastros until, I would say, probably the end of '52 or possibly the beginning of '53. That was the first time, as far as I can recall, that I met him.

MR. FOGWELL: I think that is all.

MR. KOSSMAN: All right, that is all.

MR. FOGWELL: Now, sir, he has said, as I review his testimony, that everything he learned, he learned (359) from talking to engineers and talking to Mr. Sack and Mr. Pinsley; accordingly, I think he has not told us one thing that is not hearsay evidence, and I would ask that it all be stricken and that Your Honor admonish the jury.

THE COURT: Yes, I think that what he gleaned from others who are capable of being subpoenaed, to the extent that it is offered for the truth of what was said, is hearsay, and you may disregard it.

MR. KOSSMAN: What he said about engineers working on this particular job?

THE COURT: That is correct.

MR. KOSSMAN: That is allowed?

THE COURT: That is not.

MR. KOSSMAN: You mean what engineers on this job told him about how much time was spent?

THE COURT: That is correct, because that is offered for

the truth of the words spoken. That is hearsay. You could have subpoenaed these people, brought them here, and given the Government the right of cross-examination.

MR. KOSSMAN: If the Court please, I believe that when a subcontractor is dealing with engineers and he makes these particular statements, that that is for the jury, to show that there was actual engineering time (360) being performed on this project. That is what it was offered for.

THE COURT: No, I think he has said personally he saw some people working there. That is quite all right, but not conversations that he had.

MR. KOSSMAN: In other words, the people that he actually saw working on this project, the jury may consider.

THE COURT: For whatever it is worth; yes, indeed.

MR. KOSSMAN: Now, Mr. Cardwell.

DONALD CARDWELL, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

BY MR. KOSSMAN:

Q. Are you from New York?

A. Yes; I live in Amityville, Long Island.

Q. I have not spoken to you about this case; you have been sitting in the courtroom; correct?

A. Right.

Q. To save time, you have heard the Court's rulings on other portions of the testimony, therefore ——

A. Right.

(361) Q. —of necessity we must limit ourselves, based on the Court's rulings. Will you tell the Court and jury what is present in this case.

A. First, I will tell you what I am. I was graduated from Rensselaer Polytechnic Institute in 1938. The degree was BS in physics. I went to work in a concern by the name of Allen D. Cardwell Manufacturing Corporation. They were contracting manufacturers in the electrical industry. Mr. Kuhn filled in the background.

In 1951 I was the chief engineer of the Parts Producing Corporation. We received this subcontract on relays.

Q. From whom?

A. From Espey.

Q. Yes.

A. The contract was actually awarded by Sol Pinsley himself. I had contact with Sol Pinsley, Edward S. Robinson, Jack Petker, the men that were working with Jack Petker—their names escape me; I don't remember them now.

To save the Court's time, I will tell you what I saw. I visited Espey several times. I saw engineers running vibration checks on this job. I saw Jack Petker working on a generator which he told me they were having trouble with.

MR. FOGWELL: Objected to.

(362) THE COURT: Objection overruled.

THE WITNESS: Everything else is hearsay? All right.

BY MR. KOSSMAN:

Q. Did you see the special laboratory test equipment made up for this job?

A. I did. As a matter of fact, some of these special laboratory equipment was loaned to the Parts Producing Corpo-

ration. We had it on our premises for about eight months to a year, the particular equipment that was needed to test relays.

Q. Is there anything else, subject to the Court's limitations to the prior witness, because we are necessarily so limited, that you can tell that would throw more light on this case?

A. Not that I know of.

Q. How long have you known Mastros, the defendant?

A. I never met him until this morning.

MR. KOSSMAN: You never met him until this morning. Thank you, very much.

CROSS-EXAMINATION.

BY MR. FOGWELL:

Q. You are not an accountant, are you, sir?

A. No, sir.

(363) Q. Your educational background, you say, is in physics?

A. Well, I was awarded a BS in physics degree, which is a degree in electronics, chemistry, and so on. My background has been in engineering and production of electronic equipment. At the present time I am a senior engineer with the Sperry Gyroscope Company working on inertial guidance.

Q. How many times did you visit Espey?

A. I would say in excess of twenty times.

Q. Over what period?

A. Over—well, I was there when Sol Pinsley said he was going to award us the contract.

THE COURT: No, no.

THE WITNESS: That was in December of 1951. From

then on approximately twice a month until the termination in February, around February 20 in 1954—1953, I mean.

BY MR. FOGWELL:

Q. Your company also had business with the Pinsleys before and during this contract?

A. That is correct.

Q. On other contracts?

A. Yes.

Q. Do you know the Pinsleys?

(364) A. No, I know who they are. I mean, I don't—I didn't know them. It was only a business relationship.

Q. You say you saw certain relays?

A. No, I saw a generator.

Q. You saw a generator?

A. Generator that was giving problems. I was asked, as a matter of fact, for advice.

Q. Did you know that Espey was manufacturing generators under this contract and also under other contracts?

A. No, the question was raised with regard to this contract that is under dispute here.

Q. Well, actually the generator that you saw being worked on, you did not know which contract that was for, did you? You didn't have personal knowledge of it, did you? Actually, the generator you saw may have been going to RCA-Victor or General Electric Company, may it not?

A. No, it was for the Signal Corps. They had Signal Corps drawings on it.

Q. Well, as I say, even at that, it might have been for the Signal Corps or the Government under another contract rather than 381, might it not? You have no personal knowledge, do you?

A. I think that point is well taken. That is true.

Q. You don't know how these various people you saw at

(365) Espey—you don't know accountingwise how their time cards were made out, do you?

A. Definitely not.

Q. The vibration testing activity, for all you know, may have been for another job also, may it not?

A. No, because they were testing out relays.

Q. Well, as I say, did you know that Espey was putting through relays for this contract and for other contracts?

A. They were testing the relays that we had submitted to them.

Q. I understand that.

A. For this contract.

Q. Did you know they were putting through relays for this contract and also for other contracts both commercial and Government?

A. The relays that we supplied Espey were according to the specific contract number that was submitted in accordance with a certain purchase order from Espey, and they were testing this release; that I know.

Q. How many times did you see that—really testing?

A. I made in excess of four visits.

Q. And how long were you there each time?

A. About two and a half hours.

Q. So that would be about ten hours in all. As I say, (366) you don't know how that time was charged up?

A. I know nothing about it.

MR. FOGWELL: That is all.

RE-DIRECT EXAMINATION.

BY MR. KOSSMAN:

Q. Spread over what period of time, those four visits?

A. I would say it started in May or June of 1952.

MR. KOSSMAN: All right; that is all.

THE COURT: I want it understood this testimony has been received solely in order, I take it, that it will be tied in, in some way, by the defense with some engineering work done there, which would in some way, if the jury believe what has gone before, tie in with the 2 or 3 per cent that the defendant says was a representative and fair figure. I do not think this has anything to do with the alleged falsity of the figures. It may well be that it would be a circumstance with respect to the intent of the defendant, but these witnesses cannot say, and they are not competent to say, that this difference between the $2314 in the aggregate and the $80,000 charged was in anywise correct.

MR. KOSSMAN: No, these people know ——

THE COURT: Nothing about the alleged falsity of that figure?

(367) MR. KOSSMAN: —know that there was actually engineering work done on this project.

THE COURT: For that limited purpose—that is correct.

MR. KOSSMAN: And Your Honor allows it to go to the jury for that purpose?

THE COURT: Yes.

THE WITNESS: Am I through.

MR. KOSSMAN: All right, that is all.

If the Court please, as I had promised the jury in my opening speech, the defendant will take the stand now.

* * * (N. T. p. 367.)

GEORGE MASTROS, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

(368) BY MR. KOSSMAN:

Q. Mr. Mastros, are you an American citizen?

A. I am.

Q. Were you in the last war?

A. I was in the Army.

Q. Well, you have been sitting here since Monday. You have heard how the Court makes rulings and the district attorney objects, and subject to what you have picked up on that, will you tell His Honor and the jury and the assistant district attorney everything that is pertinent about this case. You are charged, as you know, with having made a false claim wilfully and maliciously, and false representations wilfully and maliciously, in a settlement proposal. First, I will ask you, did you do that?

A. No, I did not.

Q. Will you tell the Court and jury everything that is pertinent about this case from the day you started work for Espey until you left. Talk loud so that everyone can hear you.

A. I started work for Espey in 19[illegible]. It was the last two days of July, 1952, that I went to work for them. I got that position from answering an ad in, I believe, the New York Times. When I started that position I had found quite a number of irregularities, to my knowledge of (369) thinking and in my experience; I had found—my predecessor happened to be there for the week before he left and was showing me around—I found that he was estimating inventories submitted to the bank for V-loan purposes as collateral, and he was trying to show me how to do that particular job. I couldn't understand it, primarily because

there was nothing to tie into the books. It was done strictly on an estimated basis.

Well, after my predecessor left—and incidentally he left no files, and I think a generally sloppy office. After he left —I had taken this position on the wing—I attempted to straighten out what he was doing. I felt that inventories submitted to the bank for V-loan purposes—and incidentally the Government was guaranteeing this V-loan—should be rectified, and I turned this job over to the chief cost clerk, the chief cost accountant for this department of mine, and I told him that this should be his job and that he should follow through and get these figures correct and see that they do tie in with whatever records we have.

Incidentally, that was eventually accomplished, and we had an audit of Espey, a physical audit, by the Air Force, and it was found that the figures did tie in with whatever records we had.

(370) Now, when I came to Espey I found that the cost ledger sheets started from the beginning of that particular year, and there was a blanket inventory figure carried over for each particular job. In other words, if you wanted to go into the costs from the inception of the job you could not very well do so with those ledger sheets. I instructed the cost accountant, the chief cost accountant, that I wanted cost ledger sheets set up, and bring all the costs from the inception of each job into the picture so that the Government auditors, when they come in, will be able to understand the situation—as a matter of fact so I could understand the situation and the company could understand the situation.

Also I wanted provision for installing the credits on those new sheets—that is, the credits to income or charges against income. When the job is written off, the credits should be right on the same sheet instead of working papers, as the company says—they had working papers on the so-called cost of sales.

I might infer at this point that I tried to find out what the cost of sales was in the prior years, and I could never

find work sheets to prove into the financial reports. My intention of obtaining these work sheets was to set up these new cost ledgers showing all (371) the costs on each project from the inception of the job, and to bring into account all of the cost figures, cost of sales figures, written off on each job, and I needed these papers to set up my new system. Well, as it were, I never got these papers. What papers we did have in the office did not tie into the financial reports made up by the CPA's, as I stated before, and I had assigned several accountants to try to clear up this matter so that we could go on without procedure and accounting setup.

Incidentally, the 1951 ledger that was supposed to have been lost did appear, and I saw on that ledger that they did have cost of sales on it. Now, that was by a—that was made up by a control by the name of Larry Clyde who was the predecessor. I looked at those records and thought he did a pretty good job, and I set out to set up our records on a similar basis, and I asked our cost accountant, Mike Barbarone, about this situation, and he told me that even the 1951 ledger was rewritten. He said that it was a new ledger and it was rewritten. I just want to infer that at this point.

Incidentally, I cannot cover all phases of the work going on. I cannot go into all the details. I did pick up a card or two from the engineering department at that time. It was within the first few months that I (372) was there. And I asked Mr. Barbarone who was the cost accountant there, "Who makes out these cards?" These are like the exhibit here, G-13. This particular card probably was not picked up. I don't know whether it was or not. I picked up any card I had in front of me, and I asked him why the engineers were not making these cards out as they were incurring cost. It happened to be a blank card at that point such as Mr. Grossman had picked up also, and he told me, "Well, the engineers in most instances did not bother filling out the cards." He said, "We ought to fill out the cards down here."

So I asked him, "Well, what information do you have to fill out these cards, or how do you know what job to fill in?"

Well, he said, "We call the engineer and sometimes he gives us a job number, or in most cases whatever job he worked on before. We just added it on that way"—in other words, continued on that job.

I also stated that I saw the cards were worth absolutely nothing. It had no signature on it. It had no job charges except for what the clerks put on. Some cards may have been filled out by the engineers—that I don't know. Looking through the cards I could not tell whether it was the clerks' charges or the engineers' charges, (373) however, I had to take the clerks' word for it that they filled in most of the charges themselves, so the cards were worth nothing to me because they had no signatuers on them; there was no authorization on them; so I told Mr. Barbarone, "We will have to cut this thing out. I must have the engineer's signature, and I must have the supervising engineer sign, whoever it may be, whoever the supervisor may be, and that card I designed in the first half year I was there.

Q. Is that the card?

A. That is D-4. On this card I have provided for the employee's signature and an authorization, and I had given the engineers strict instructions that they must fill out the time cards themselves, and for a while I went upstairs and looked at the time card rack to see whether they were filling in the cards each day. Well, they followed it out for one or two weeks, but as I said before, I cannot follow up all these details myself. I gave the instructions to my subordinates, and I expected them to follow it through. However, time and time again I found that the engineers were lax in signatures, not even the job number or time put in.

I issued a statement to the engineers that if they did not fill out their time cards and sign them (374) I would not pay them. Mr. Sol Pinsley objected to that because that happened. They did not fill out the time cards and I held

up their pay. I don't recall when this was, but it was after my joining Espey. It was before this termination, by the way. And, of course, Mr. Sol Pinsley came in to me and says, "What is this? You are holding up the payment to the engineers." And I told him, "I asked them to fill in the time cards, and they haven't. The clerks here have to do it for them." Well, he instructed me to go ahead and pay them, which I did.

When I first joined Espey I also approached Mr. Sol Pinsley and stated that I would like to set the engineers up on a budget basis; in other words, each engineer is assigned a project, or he may have two projects—or, let me say this, each contract is assigned to an engineer when it comes into the house. I asked Mr. Pinsley, Sol Pinsley, if I could not have the engineers held responsible for the project or for the contract from the inception of the job until the end of the job, and that I might submit costs on a weekly basis for each of these engineers so that if any other engineer charges his project without rightly doing so the engineer receiving the report of the charges on the job for the week would come to me and explain about it and we could follow up the (375) matter from that point and correct the situation. I did that down at Hazeltine and I was trying to install the same system in this particular company.

Mr. Sol Pinsley stated, and I quote, "Engineers are prima donnas,' and he didn't want them to have any more information or responsibilities to give them so much more of a prima donnaship, so he said he didn't agree with me, to leave it go as is.

I had also started a departmental accounting system. The purpose of a departmental accounting system is to isolate costs in the proper departments and thereby reflect more accurate costs, which I thought would benefit both the Government and the company. It benefits the company from a budget standpoint. Eventually we could have installed a budget for departments and have each department head

responsible for that budget. I went ahead on this basis. Incidentally, I never asked the Pinsleys whether I could install that budget; I just went ahead and did it. I went ahead and installed it on a departmental basis without making the Pinsleys or the accountants.

Now, let me go back a bit to this job cost ledger that I tried to set up, and I tried to get the cost of sales information. I had had occasion to call the company CPA's and ask them if they had any information which I could (376) tie into the statements so that I could come up with the credits for each job.

Well, they said, "What do you need that for?" So I told them I would like to set up these job cost sheets so that I could have the costs from the inception on each product, and also I want the credits so they can come up with a balance each part of the year, to which words Mr. Rubinroit said, "That is not our procedure, and we don't want to do it." I couldn't get whether he had those tie-in papers or not. I don't know. At any event I never got them, and therefore I could not finish what I had set out to do, however, we did rewrite all these sheets bringing in all the costs on each job from the inception of the job, so that when these men came in they did see the costs from the inception of the job; they could have the picture in front of them and not have to go from one book to another to get into the cost of sales picture and then come up with an inventory. That would have wasted a lot of time for them. And it might have covered a lot of things. I don't know what Espey was trying to cover, but it might have covered up a lot of things.

* * * (N. T. pp. 376 to 378 inc.)

(379) GEORGE MASTROS, resumed.

DIRECT EXAMINATION (Continued).

BY MR. KOSSMAN:

Q. Will you read the latter part of the witness' answer of yesterday.

(The reporter read as follows:

"Now, let me go back a bit to this job cost ledger that I tried to set up, and I tried to get the cost of sales information. I had had occasion to call the company CPA's and ask them if they had any information which I could tie into the statements so that I could come up with the credits for each job.

"Well, they said, "What do you need that for?" So I told them I would like to set up these job costs sheets so that I could have the costs from the inception on each product, and also I want the credits so they can come up with a balance each part of the year, to which words Mr. Rubinroit said "That is not our procedure, and we don't want to do it." I couldn't get whether he had those tie-in papers or not. I don't know. At any event I never got them, and therefore I could not finish what I had set out to do, however, we did rewrite all these sheets bringing in all the costs on each job from the (380) inception of the job, so that when these men came in they did see the costs from the inception of the job; they could have the picture in front of them and not have to go from one book to another to get into the cost of sales picture and then come up with an inventory. That would have wasted a lot of time for them. And it might have covered a lot of things. I don't know what Espey was trying to cover, but it might have covered up a lot of things.

"Now then, this particular contract that we are discussing.——")

THE WITNESS: Would you cross out that last sentence —"this particular contract we are discussing."

MR. FOGWELL: I didn't hear what you said.

THE WITNESS: Would you cross out that last sentence, "this particular contract we are discussing."

To continue on my attempts to put in proper sytem and control, I want to add these situations that I was confronted with.

MR. FOGWELL: Will you speak a little louder.

THE WITNESS: We had a Saratoga plant—that is, Espey had a Saratoga Division, and it had just started in 1952. I think it started just prior to my obtaining a position with Espey. At any rate I did try to set up (381) an accounting system up there which would be much finer than they had in New York. At least this was a new organization. I thought we could start off on a good foot. I wanted to set up a daily time cost record. In other words, as the people incurred the time during the day they should record that time on a job card. I had conferences with the McBee System people, and after weeks of study we had decided on the system that we wanted to install.

This Saratoga Division was run by a chap by the name of Ben Samsky, and they had an engineer by the name of Si Saslow. Mr. Saslow, I believe, came into the picture sometime in September, 1952. I could only get up there on Saturdays, since I was very busy in New York. I put at least sixty hours work in this job. I spoke to Mr. Saslow, and he was a fresh employee, a new employee, and I stated my views on what I thought should be a proper cost system and what information should be obtained. Mr. Pinsley was

very agreeable, and I thought, here at last I have somebody who at least understands what I was trying to drive at in bringing out more detailed costs and more so having some control over these costs.

Well, as I said, I called in the McBee System and told them to try to get this started by the first of the year. We had a rush order put in for the McBee System (382) cards. They are a sort of card to ease clerical work in obtaining the detailed information. McBee had the cards ready sometime in December—I think it was the beginning of December—and we had an operator, an instructress, sent in by that company to show the people in the office at Saratoga how to use the system. This woman I had not met. This woman and a representative of the McBee System from Albany appeared. As a matter of fact, this woman flew up from New York City. Samsky and Saslow objected to their coming in. They said that they weren't ready; they were too busy to work on it. I said, "You don't have to work on it; let the office staff work on it." And, incidentally, the office staff was very little. There were very few people there. I think there were two people or three people in the office.

BY MR. KOSSMAN:

Q. I don't want to interrupt you, but would you get more to the point of the case rather than too many descriptive adjectives.

A. At any rate, then they said that the office was too busy to handle it, and I said, "Well, when will they be able to handle it? How about next week?"

"All right, next week," they said. I sent these people from McBee up again and they refused to (383) have these people start on the system. As a result, McBee was thrown out and they filed a claim against the company for all the costs involved.

Well, I went up there and designed a system again by myself installing daily time cards and summary cards and so on which I asked them to please cooperate and try to have this system work—at least some system working. It seemed to me that they were objecting to my interfering. I also asked these people, since this Saratoga Division was a division which acted separately from the New York company and they used to ship the parts on this particular contract we are talking about and all other contracts—they shipped parts from there to New York City—I asked them so many times to please try to work up a price on each item that was shipped to New York and bill New York for them. Now, they always said they would ——

Q. Tell me, can you speed it up a little more in terms of this particular case?

A. Then they said they didn't have the time. Anyway, they gave quite a few excuses. I finally told Sol Pinsley that I wasn't getting any cooperation from himself nor the people up there, to which he stated, "Well, all right, we will see them on a Saturday and we will talk it over."

(384) We got together on a Saturday. I waited around for them to get in a conference all morning. Incidentally, I caught the 6:50 plane up there, 6:50 a. m. plane, and I waited until one o'clock before they called me in, and they were having their lunch in the place, and in that meeting I asked them if they would not abide by my requests, and, of course, they agreed.

The week after that nothing happened. The week after that nothing happened. I called to find out why we can't have a system followed, and I got some kind of an excuse that indicated I was being disregarded.

Q. Can you speed it up in terms of filing this claim, why you filed it with the facts you have heard about. I don't want to cut off something that you think is important.

A. Incidentally, I also tried to put in material control which the company was for buying, and I tried to keep that down also. I received no cooperation there also. They

were making shipments between plants with no records. The Pinsley's relatives had the key positions in the place. The receiving department was run by Dave Blatt and the shipping department was run by another relative, Frank Bryan, and the material control department was run by another relative, Dave Potaker.

I brought this point of over-buying to the (385) attention of Mr. Pinsley, Nathan Pinsley, and incidentally, Mr. Nathan Pinsley was rarely around, and when I caught him in I mentioned these facts to him. I also told him that I asked Sam Sack about certain information, and he would always refer me to Sol where either the questions were dropped or I got some kind of an exaggerated answer. Mr. Pinsley said, well, he didn't think it was possible that they were over-ordering so much, until I pointed out certain facts to him. Well, he still seemed to protect his brother, and he says he doesn't think that is possible, and I indicated to him on one particular contract they had bought around $30,000 worth of parts and the crates were not even opened; the contract was finished.

Mr. Pinsley said, "Well, if you don't get the cooperation, just don't bother asking them; just go ahead and do it yourself."

Now, in the meantime, just before this particular contract was terminated, we had started getting partial payments from the Air Force on the Air Force jobs. I think, as a matter of fact, that was sometime around August or about a month or so after I started on this position. Now, I gave specific instructions to the cost accountants that I wanted these Air Force jobs checked, investigated and watched. I even told them to go out in (386) the plant and spot check the time cards; I want to be sure that the charges are getting into this contract correctly. There were two contracts, Air Force contracts.

They did that on a monthly basis—also on a weekly basis as a matter of fact—but on a monthly basis they would summarize and make up special reports to me, and I also

told them that if they saw any discrepancies or found any discrepancies or questions that they should bring it to my attention.

Now then, this subject contract 381 was terminated around February 20—I believe we sent out the telegrams February 20 to the suppliers—of 1953. I asked the cost accountants to give me the total costs incurred up to date, and, incidentally, just prior to this time, in January, we had filed a requisition order request for partial payment on this particular contract, and I was keenly interested in getting the money on the materials. We picked up whatever labor we saw around, which was around $3000, and I certified the fact that this—these costs were reasonable.

Now then, this particular contract was terminated and I got the costs from the cost accountants, and I talked to Mr. Barbarone in my office after studying the figures. I said, "It seems to me that when (387) I was down at the Contract Adjustment Board hearing there was a great deal of engineering involved in this particular project. This project is $3,600,000. How come $2300 worth of engineering? To me it seems impossible."

And, incidentally, at this hardship hearing I was invited to that hardship hearing. I took no part in it, but there was one point that was very impressive in my mind, because I felt that the company was doing a good job in engineering. Here is a company that came up with the models; they redesigned the inadequate model that was supposed to have been supplied by another outfit that was much bigger than ours, which was Federal Radio and Tel. and it gave me a good feeling and that stood out in my mind, and was brought out when this contract was terminated.

Q. The contract was terminated for the convenience of the Government?

A. That is right; and incidentally, at this Board hearing when General Brown was listening to all the facts involved the engineering was an important point. After all, if this

contractor took no part in this contract, why continue with it? I know that General Brown asked how much was the net worth, and I think Mr. Pinsley or Mr. Rubinroit answered this question, and it was around $700,000, and (388) I remember something about $1,300,000 being lost if they had to go through with this contract.

It was my assumption that the reason why they were given this increase was that General Brown, as I think he stated, "Well then, approximately $600,000 would cover you. And not put you out of business." Being that they $700,000 of net worth, plus $600,000, was equivalent to around $1,300,000. But I was particularly impressed about the engineering fees at that meeting, and I recalled that in looking over this contract for termination I asked Mr. Barbarone what he thought about the engineering. I said, "What happened to the engineering?"

Well, he thought the engineering was ridiculous, and he admitted that the cards, the records, didn't mean anything in the past. He said there were innumerable mischarges and changes, "And don't forget the clerks made out the cards and the engineers didn't sign them."

Well, I said, "Suppose we were to make a correction of these records; how do you go about it?"

He said, "Well, we usually make the changes directly on the cards, the job cards."

And I said, "Then what do you do?"

He said, "We continue to correct all other related records."

(389) Well, I told him that it was my belief, in view of my experience in electronics, that the engineering, total engineering cost of contract values, ran at least 2 per cent, and I think, roughly speaking, it seems to me that this contract should have at least $70,000 in it.

Well, Mr. Barbarone agreed with me, and I also asked about what he thought the company average was, Espey's average was, and I asked him to bring in some of the certified statements.

MR. FOGWELL: I don't like to interrupt but I cannot quite hear you. You said, "What the company's what was?"

THE WITNESS: Average engineering rates were. I asked him to bring in any certified year-end reports he had, and we sat down and figured the 1950 and 1951 and I believe it was the 1952 averages. Now, I had these certified statements. I know, while I was in that office. Somehow they disappeared later on. However, I have some of the certified statements right there which I would like to add to one of the exhibits I had handed in before indicating the percentages. Do you have that exhibit that was ——

Q. Which ones are not certified? These are not (390) certified.

THE COURT: He can get it later on and put it in if counsel for the Government agrees.

THE WITNESS: All right, these are copies of the certified statement. At least here the 1950 and 1951 averages you could find in there. The total balance on direct engineering costs indicated anywhere from 3½ per cent in one year, 3 per cent in another year, and 2 per cent in another year, so I stated to Mr. Barbagne that I believed that at least our 2 per cent figure is fair, and I asked him if he would instruct—I don't know whether I instructed or he instructed the other cost accountants or cost clerks into correcting these records. We had pinpointed the date of the contract which was June, 1950, and each one of these contracts as they come into the company is assigned to an engineer.

Well, we established that cost—in other words two months later was the time that engineering should have been charged to this job, and up to the point that they had submitted, had completed and submitted, a model to the Signal Corps, which was May, 1952; so I told Mr. Barba-

rone, "Well, it looks like within that period we should have at least $70,000," and he proceeded to correct the records, and I asked him if in correcting the records (391) he would please set aside these charges; I wanted a separate record made of these charges all the way through.

BY MR. KOSSMAN:

Q. Is that the reason for the "E"?

A. That is right. I asked him to use 381-E and keep the corrections separately all the way through. I did not tell him to destroy any of the old records.

Now, in the course of the changes they had all the records all over the desks. Now, when they completed the corrections they had given me a figure. They had added up all of the cards and gave me a figure which I had entered onto the settlement proposal. Incidentally, Jack Petker was around at the time. He was taking inventory of this claim, of this proposal, and he was around me at the time, and I don't rightly recollect whether it was the month of March or after the month of March that I asked him about these engineering charges, and I asked him what happened to the engineering costs on this project; did he know that there was only $2300 on this project.

He said no, and I didn't ask him this question but he volunteered it; he said, "Gee, there should be at least $60,000 on that project." And I asked him if he could think of the engineers involved, and he said he (392) would think it over; he didn't recall at that point, but he would think it over, and if he remembered the names he would give it to me. I think I asked him at a couple of other points about the names later on, which he never came up with.

Incidentally, Mr. Petker reported to Mr. Sol Pinsley.

Q. On what?

A. Mr. Petker reported to Mr. Sol Pinsley. I had prepared the proposal, and I don't know whether—and I wrote a letter of transmittal, and I don't recall whether I person-

ally handed it to Mr. Sol Pinsley or it was taken in by one of the clerks in the office. I recall handing him one of the proposals. I don't recall whether it was the one, two, or the third proposal, but I handed him one of the proposals. At any rate, he looked through the pages and engineering was spelled right out there, the cost of engineering involved in the preparation of the model as submitted to the Signal Corps laboratory. And if I recall the words are right in there, spelled out right on the claim. In one instance, the instance that I took the claim in there to have him sign it, he said, "Is this all the costs? Are all the costs on here?"

And I said they were. I believed they were. (393) And from there the claim was submitted to ——

Q. Tell me, what month are you up to now?

A. Well, we are still talking about around that period, March, April of 1952.

Q. When were these claims actually made?

A. The first proposal was sent the first week in April.

Q. So we are now in April.

A. The second one was sometime, I think, a couple of months later.

Q. Now, during that period of time didn't a fellow by the name of Weiss come in from the Government in order to investigate the hardship claim?

A. That is correct.

Q. Will you tell the Court and jury what conversation took place then. Was he told about the writing up?

A. Mr. Weiss came in, well, I believe, just as we were completing the proposal and in the middle of the correction of the records, and he asked for this project 381, and I said, "Well, I will help you any way I can." I said, "What do you need them for?"

And he said he was investigating the hardship claim. And I stated to him, "Well, I had no part of the hardship claim, and I don't know what figures were presented." (394) And he asked to see the books, and I believe that I had stated at that point that we were working on the settlement pro-

posal and that there was a lot of work involved in filling out the invoices, material invoices, and also uncovering some charges that were misappropriated to other jobs, and I said that the whole amount would be somewhere between seventy and seventy-five thousand dollars.

Q. Now, were you the one who said it, or was it one of the other fellows?

A. Well, I don't—I don't want to dispute Mr. Weiss' testimony, however, I do believe that I had stated it, and Mr. Rubinroit was around at the time, and they were having some discussions. I don't recall whether it was the first meeting or the second meeting, however, they were having some discussions about outside matters and I took no part.

Q. You heard Mr. Weiss say it was Rubinroit who said about the $70,000?

A. Well, it may have been Rubinroit. I thought I did it. It was some time in May, I believe, that Mr. Hollis, the Air Force auditor, appeared to audit this proposal. He audited another project and went right into this termination proposal.

In between the termination proposal audit he (395) had conducted a system survey, and he went up to Saratoga to make a check on the systems there, which he liked very much, and he checked on the systems in New York, but at any rate Mr. Hollis got into this audit and he saw this 381-E and asked me about it, and I said there was quite a bit of redesigning and engineering on this project, and we had set this engineering out separately for consideration.

Well, I read the contract over quite carefully, and he called me in. Incidentally, all these papers were still all over the office—all the corrected papers and the uncorrected papers—and Mr. Hollis had the run of the office. I told him anything he wanted he could have. If he wanted photostats, one of the cost accountants, make up any of the photostats that he wanted, and Mr. Herbert Potaker also made up schedules for him. He wrote up the schedules for Mr. Hollis. As a matter of fact, I assigned Mr. Potaker to Mr.

Hollis and I told Mr. Hollis, "You have him get you anything you want."

Q. Just speed it up a little more. You are now in 1953, June, and the proposals have been filed. Did you at that time decide that you would like to leave this company that you were working for? And what did you do?

A. Well, could I hold up a moment?

(396) Q. All right; this is your life.

A. Mr. Hollis told me, after reading the contract, that he didn't know whether he should pass on the engineering at all since he found no clause in the contract stating that we would be reimbursed for engineering. I told him, well, I didn't know what was in the contract, however, I believed there was engineering on this project, and I mentioned at the time about the hardship hearing, at which eyes perked up, and he says, "Say, that is the question that Mr. Goldenberg had in mind." He said there was something about this company that he, Mr. Goldenberg, remembered, and I had sparked that situation about the hardship hearing to which, I guess, Mr. Hollis did call up Mr. Goldenberg and tell him that it was the hardship hearing that Mr. Goldenberg was thinking about.

Mr. Jack Petker, the engineer, was sitting there with me. and we had the model in front, and Mr. Hollis and Mr. Jack Petker agreed with the total I had for engineering and he was showing Mr. Hollis all the ramifications of design changes that were made, "If you have any doubt whatsoever do not pass this engineering charge. As a matter of fact, I don't want you to pass this engineering charge. Put it out for further consideration in your audit. Take exception to it and put it for further consideration to the (397) contracting officer since he should definitely know what was going on in this contract."

We agreed on most points on overhead, however, to cut the story short, Mr. Hollis completed his audit, and it was I that called Mr. Hollis down at his office, if there were any discussions that he wanted to continue on, and he says,

"Well, Mr. Goldenberg and I are going over the whole proposal and it may be a good idea that you come down and bring Rubinroit along with you."

The reason Rubinroit was in the picture, there were certain overhead items, elements of overhead such as car expense and so on, sales expenses, that he took exception to, and also some pooling of equipment that was charged to overhead and Mr. Hollis thought it should be a fixed asset, a capital item.

Well, Mr. Rubinroit came down and he seemed to dominate the discussion with Mr. Goldenberg on the theory of accounting. There was some question of cost of sales bases. Well, I had used the cost of sales basis that Mr. Goldenberg wanted, anyway, and I couldn't understand why they spent a half hour discussing the principles of accounting. At any rate there was no discussion about engineering there.

Q. When was this?

A. This was some time in the latter part of June, 1953. (398) As I say, there was no serious objection to the overhead, except Mr. Goldenberg asked the specific question: he said why did you use the flat rate of 100 per cent for overhead?"

I told him I used an over-all average for the three years, using a flat rate, believing this was an interim report anyway, subject to changes upward and downward, and we left it to the Government auditors—whatever rate they came up with we would use.

Well, Mr. Goldenberg liked the idea of m, departmentalizing the 1953. After I came in the organization I departmentalized the accounting and he asked if I would be good enough to reconstruct 1951 overhead and the 1952 overhead on the same basis as I did for 1953. Well, I said, "It will take quite some time," and it was quite a job, because we had to go through the records for all of 1951 and 1952 to reconstruct the overhead to Mr. Goldenberg's liking, but I agreed to do that, so we held the proposal in abeyance. Well, this meant that it opened up the audit again over the

summer months. It was vacation time. And it took a couple of months before we had completed that job of reconstructing the overhead, and we finally submitted a third proposal some time in August, 1953.

The third proposal was the same as the first and (399) second proposals except that the overhead had actually increased—the method of using the overhead had actually increased that third proposal.

Q. Now, would you go back—why did you in May of 1953 while this was going on—why did you want to leave Espey? Why did you want to leave this company, and what did you do about it?

A. Well, as I tried to show before, I did not receive any cooperation from the principals which I should have. I mean, if they really wanted to have a good accounting system they would have helped me. In my previous job, Hazeltine, there were quite a few problems, but those problems were made easy by full cooperation of all the people involved in that company, and here I was not getting any cooperation, and I thought, there is no use staying, and I don't see why they need me here. I did start processing for another job—in other words, getting set for another job, answering ads in the newspapers, and also seeing a personnel outfit, getting out resumes or letters for me.

Q. I am going to have these marked as a defendant's exhibit in one group, A, B, C, D, and I ask what efforts did you make at that particular time to get a different position. Did you contact any employment agencies? Did you pay any (400) employment fee in order to get a job in June of 1953?

A. No, I did not pay any employment fee. You don't pay an employment fee until you get a position.

Q. Well, what is "Resume Service?"

A. A service that will answer letters for me, and they also made up a sort of brochure for my experience.

Q. In June, 1953?

A. No, that was in May.

Q. May, 1953?

A. That was in May, actually. I finished paying it in June. As a matter of fact, June 3, 1953, I completed the payment. But there were agencies that I contacted.

Q. In other words, at that time you were trying to leave the place, looking for other employment?

A. Yes, at that time and before that time, too. It was some time in April that I was looking for employment.

Q. O. K. While you were handling the contract termination?

A. That is right. I also saw a management consultant at the time who recruits personnel for their clients, and that was Handy Associates at 270 Park Avenue.

(Check dated June 3, 1953, to National Business Service in the amount of $20 drawn on Manufacturers Trust Company by Mastros marked Exhibit D-5A.

(Bill dated June 3, 1953, National Business (401) Service Company to George Mastros marked Exhibit D-5B.

(Letter dated November 4, 1953, Ernst & Ernst to George Mastros marked D-5C.

(Letter August 21, 1953, Plocar Company to Mastros marked Exhibit D-5D.

(Letter July 14, 1953, Booz, Allen & Hamilton to Mastros marked Exhibit D-5E.)

BY MR. KOSSMAN:

Q. As quickly as you can will you explain what these letters mean in terms of seeking employment through an agency at that particular time?

A. Well, Exhibit D-5A is a check endorsed by the National Business Service.

Q. Whose check is it?

A. My check.

Q. What was the check for?

A. The check was in payment of the balance of a resume service that the National Business Service Company had done for me.

Q. What is the date on the letter?

A. The letter?

Q. Yes.

A. This is a paid bill June 3, 1953.

Q. All right, what is the next letter?

A. Well, incidentally, it was about this time—more than a week before this time that they started preparing this, and I had to pay a deposit.

(402) Q. What is the next letter?

A. Well, incidentally, it was before this time—more than a week before this time—that they started preparing this and I had to pay a deposit.

Q. What is the next letter?

A. The next letter was August 21—no, I am sorry, D-5C was the letter from Ernst & Ernst.

Q. Who are they?

A. Public accountants. They were looking for a man for one of their clients.

Q. Is that the letter addressed to you?

A. That is the letter addressed to me.

Q. You need not read that. What is the date?

A. November 4, 1953.

Q. What is the next letter?

A. D-5D. The date of the letter was August 21, and it was from the John J. Plocar Company.

Q. What are they?

A. Management consultants who were looking for an employee for one of their clients, and they said it was a hard decision to make because all four candidates were all well qualified and could handle the job very well.

Q. So that was a letter turning you down?

(403) A. That is right. Then there was a letter from Booz, Allen & Hamilton.

Q. What date is that?

A. July 14.

Q. What year?

A. 1953. This is all 1953.

Q. Go on with your story. You don't have to read the letter. It is in there.

A. As I was going to say, there were also other letters from the Handy Associates dated April, 1953, but I was not able to locate those.

Q. All right; at any rate, during this particular period you wanted to leave the place?

A. Yes, sir.

Q. Go on with your story in terms of this termination of contract.

A. And incidentally, while Mr. Hollis was there during the audit in May, during the audit I told him I was not going to be with the company much longer any way. I told Mr. Hollis that. We were quite friendly.

Q. Now, the three have been filed; right? Can we jump now to the first of October, 1953?

A. You mean the last audit?

Well, in the meantime, I might add this, that (404) I was always careful to see that the company did not receive anything that they were not justifiably entitled to. On one contract—that is Air Force Contract 33038-25596 ——

THE COURT: Do we have to go into this?

MR. KOSSMAN: What was it?

THE WITNESS: The point involved here is that they wanted to give me more partial payments than I thought we were entitled to.

BY MR. KOSSMAN:

Q. Was that a $400,000 check they sent you?

A. Well, $200,000 was involved. There was also another point involved, that that contract was going to be reduced from $2,300,000 to less than $2 million, and on partial payment clauses we are only entitled to 80 per cent. The maximum partial payments you are entitled to is 80 per cent of the contract.

Q. So you saved the Government money?

A. That is right; I did not accept any more partial payments on that contract.

Q. Let us go on with the case, but do not let me keep you from saying anything you think is important.

A. There was also the point here that I received the $200,000 check and I saw on this particular contract that they had neglected to deduct the liquidation of 80 per cent (405) toward liquidating the partial payments. In other words, that check should have been only about $40,000. Now, I called up the Signal Corps who mailed me that check in Philadelphi[illegible]e. I called the vouchering section. Now, it was either a Mr. J. H. Rosenberg or Nathan Gerber—G-e-r-b-e-r—of the voucher section, and I said, "I would like to return this check to you, and I am just notifying you that I am returning it to you," and he asked me to forget about it and deposit it. He said, "The whole thing will be taken care of at the end of the contract period.

Q. All right. You have made the point. In other words, throughout the time you had been working there you would not allow the Government to be cheated even when they knowingly overpaid?

A. That is correct. I returned the check, in any case.

Now, at the time Mr. Grossman came in and audited another small project, and went into this particular settlement proposal—that was Settlement Proposal No. 3. Now, at that date ——.

Q. What date is that?

A. That was—when he came in I think it was sometime in September, 1953. The accounting department still had all the cards and all the records laying around on decks. I instructed all the members of the accounting department (406) to give Mr. Grossman all the cooperation they could give him. He went through with a complete audit, and toward the end, which was some time in October, Mr. Nathan Pinsley came out and stressed a suspicion about this audit being so slow, or this whole matter being delayed and slowing the process of having it processed, and he told me to go back in the accounting department and forget about the auditor's books; he will have Mr. Rubinroit come in and take care of any questions they may have. From that point, which was some time in the beginning of October, to the end of Mr. Grossman's audit, I had—I don't know whether I had any conversations with Mr. Grossman at all. If there was, it was just a "Good morning" and "Good night."

I got a call from Mr. Goldenberg asking me for certain data or papers, and I at that time told him that I was taken off this audit and this whole situation, and Mr. Rubinroit was supposed to have taken over, so I said, "I can't do anything else but advise you to get in touch with Mr. Rubinroit."

Now, sometime later—I think it was within a week or so—it was somewhere near the middle of October that I had been downtown in the Air Force Building, and I stopped in to see Mr. Grossman or Mr. Goldenberg and I asked them how the audit was proceeding and what was (407) status of the proposal.

I did ask him if there was any way that we could get some partial payments on the proposals—not only this proposal; there was another proposal—to which Mr. Goldenberg brought out the point that he was not satisfied with the proposal itself, and there was some question about the engineering.

Q. What did you tell him and what happened then when you talked about that?

A. Well, I told him that it was my feeling, of course—we went into that hardship hearing, and I said at that point there was discussion of how much engineering was involved, and in view of that and from the experience of the company I felt that this engineering was logical and ——

Q. Did you tell him he could get an Army engineer and check up and find out whether it was correct or not?

A. Yes, I thought I had mentioned that to Mr. Grossman who was there, and Mr. Grossman said it was a good idea. I told him to forget about the engineering; "I don't want you to pass on it. Let us get an Army engineer in and let him evaluate it."

Q. All right, what happened after that? What happened after that?

A. Well, nothing happened after that. We walked out (408) together.

Q. What is the next that is important in this case?

A. All right; it was within a week, or a week, after—I don't recall, but it was soon after I had visited Mr. Goldenberg and Mr. Grossman that Mr. Nathan Pinsley called me into his office and asked me what was the status of this proposal, and I said, "It seems that there is some difficulty deciding on whether the engineering on this project is reasonable." And I stated at a point that Mr. Goldenberg states that these schedules for the hardship hearing only indicated a certain amount of costs for engineering, and I had so much more in the proposal—I said, "To get that amount I had to go back and correct all your records, which were in a mess, to bring out this amount."

Well, he says, "I don't know if that is correct or not."

Q. Did you tell him that the Air Force was going to start to investigate at that time?

A. I didn't tell him they were going to start to investigate; I told him that Mr. Goldenberg was looking into it.

Q. Well, all right.

A. And also that Mr. Goldenberg was trying to get more (409) information from Mr. Rubinroit. Well, he stated that

he would call Mr. Rubinroit and have him check into what this situation is all about. And I stressed my viewpoint right there. I said, "Are you disclaiming the fact that you had mentioned that there was engineering on this job at the hardship hearing?"

Well, he didn't talk. He says, "Well, let's call in Mr. Rubinroit and find out." Well, I don't know when Mr. Rubinroit got together with him, but I had disclosed this quite soon after I talked to Mr. Goldenberg, and what they did about it, I don't know, except that a week later Mr. Rubinroit came in to see me and we went over the whole situation from that point on.

Q. Now, let us jump into the agent. Mr. Miller came around to see you; right?

A. Mr. Miller came sometime in November.

Q. 1953; right?

A. That is correct.

Q. You heard what he testified. Am I correct in saying that what he testified from the stand that you said to him is substantially correct, so we can save a lot of time?

A. It is substantially correct.

Q. All right, then we don't have to go over that. Now, do you know whether Mr. Miller tried to interview the (410) officials of this particular company and the accountant, and did they claim privilege and refuse to testify and give him statements? Do you know that or don't you?

A. Yes, I understood that happened.

Q. Now, next, did they hire lawyers, the officials of the company?

A. Yes, they had quite ——

Q. What lawyer did they hire in New York?

A. Well, in New York they had a Mr. Richenthal, and they had a Judge Koenig.

Q. Who was Judge Koenig?

A. He was the attorney for Mr. Pinsley. Judge Koenig is the son of a Republican leader of New York State.

Q. Now, who advised them ——

THE COURT: I think we ought not to go into this. I have sat patiently, but the Government has let testimony go in here. I won't hear more about this—about lawyers.

BY MR. KOSSMAN:

Q. At any rate, you gave a statement to the agent?
A. That is correct.
Q. You talked to them?
A. Yes.
Q. You went to the grand jury and you testified before (411) them?
A. Yes.
Q. And you are here today as a defendant; correct?
A. Yes.
Q. Now, I want to ask you this: Is there anything else that you can quickly tell us, because I have the feeling that the jury knows now everything—is there anything else that has been omitted that is important?

Oh, yes; oh, yes; there was a claim filed where they dropped the engineering amount; is that right?

A. Yes, they later filed—I did not participate in that—they later filed another proposal, an amended proposal, and as I understand, the latest one is approximately $1,400,000.
Q. Oh, you mean the latest one?
A. That is right. There were later ones after the ones submitted here at the trial.
Q. You mean after taking out the engineering?
A. That is correct.
Q. Tell me this. We are now in 1954, right? January, 1954, about that particular period, all this business was going on in New York; is that correct?
A. Yes.
Q. As a result of doing all this—by the way, will (412) you tell the jury what is the reason that Mr. Pinsley in your opinion decided to drop the engineering fee in the amended claim?
A. Oh, I don't know what reason he had.

THE COURT: How can he divine what Mr. Pinsley's motive was?

MR. KOSSMAN: If Mr. Pinsley told him.

THE COURT: You didn't ask him that.

MR. KOSSMAN: You are right.

BY MR. KOSSMAN:

Q. Did Mr. Pinsley ever give you the reason why?
A. No, he gave me no reason why.
Q. Now, after you had filed these papers, you worked for them in 1953; you started at ten; you had been raised to $15,000: As a result of all this work that you had done, what was your salary? You were getting now $15,000. Beginning in 1954 how did this corporation reward you for what you had said you did here on the stand? What was your salary then?
A. Well, I started—within a month after I started I was given the fifteen. Now, after this situation evolved, much later than that, he reduced my salary to ten.
Q. Oh, he reduced your salary to $10,000?
A. Yes, sir.
(413) Q. And you worked there? Why didn't you leave him in 1954? You were looking for a job; why didn't you leave him then?
A. Well, when this situation came up with the F. B. I. I wanted to stay around and clear up the matter as far as I was concerned.
Q. You finally left them in 1955; is that correct?
A. That is correct.
Q. And you are working for another outfit now?
A. That is correct.
Q. As an accountant?
A. Right.

Q. You are not a certified public accountant?

A. No.

Q. What is the name of the firm you are working for now?

A. Majestic Radio.

Q. Majestic Radio, in New York City?

A. New York City, yes.

Q. Is there anything else that you think is important in this particular case that has been left out, that we have not heard from other witnesses?

A. Well, I can only say this. There was an occasion—before I go into that, I mentioned at the beginning of my (414) testimony that I had very little and practically no files on past history of the company. I had no idea what taxes they were paying or what the renegotiation situation looked like. There was another person in the office, a Milton Auerbach, who took care of the general ledger. I caught him in the hall one day handling a federal tax return which was being filed. Mr. Rubinroit made out these tax returns, and I asked Mr. Rubinroit to get me a copy of that. Mr. Rubinroit said all right, he would, but somehow there seemed to be a direct line between Mr. Auerbach and Mr. Rubinroit, because Mr. Rubinroit found out about that, and he immediately—I imagine he immediately—called on Mr. Pinsley, because soon after that I was called into Mr. Pinsley's office.

THE COURT: That is going too far. I am going to strike that out. Let us move along with competent testimony.

BY MR. KOSSMAN:

Q. Are these certified copies you are referring to?

A. That is correct.

Q. Are they important in this case?

A. Yes, that is all I have, the certified copies.

Q. You have four of them here. Are all four, or just two ——

(415) A. There is a 1950 and 1951. The 1952 is actually incomplete there.

Q. 1950, 1951 and 1952?

A. That is right.

Q. In that way you established the percentage?

(To Counsel.) Do you want to look at them?

(Counsel confer.)

MR. FOGWELL: If Your Honor please, I am looking at these for the first time. If you are going to take five minutes, I would suggest that this might be a good time.

THE COURT: All right, we will recess for five minutes.

(Recess.)

MR. FOGWELL: These are financial statements of the company.

THE COURT: You have let all this go in; I don't see any objection now.

MR. KOSSMAN: It goes to the mental make-up.

MR. FOGWELL: Well, I don't think it is important.

MR. KOSSMAN: We will mark them in one group.

(Kalish, Rubinroit & Co. Examination June 30, 1950, Espey Manufacturing Company and subsidiaries marked (416) Exhibit D-6A.)

(Espey Manufacturing Co., Inc. report on examination June 30, 1951, marked Exhibit D-6B.)

(Kalish, Rubinroit & Co., examination March 31, 1952, Espey Manufacturing Company marked Exhibit D-6C.)

THE COURT: Let us move along a little faster.

BY MR. KOSSMAN:

Q. Are these the financial reports you used as bases in your mind to figure out that they were running 1 or 2 per cent engineering costs?

A. That backs up Defendant's Exhibit 3, I think.

Q. It backs up what you said?

A. That is correct.

Q. I am afraid to ask you if there is anything else you want to say, so I will conclude the examination by asking you these two questions:

You are charged in the indictment, Count 1 and Count 2, with having made a false—I will shorten it—with having made a false statement to the Government, a claim against the Government for radio telephonic units on behalf of Espey Manufacturing Company, knowing such claim to be false, fictitious and fraudulent, and that you made false, fictitious and fraudulent statements with reference to a settlement proposal dated July 31, 1953. Is that true or false?

(417) A. No, sir; that is false.

Q. Did you in any way attempt to defraud the Government on behalf of these people?

A. No, sir.

MR. KOSSMAN: That is all.

THE COURT: Cross-examine.

CROSS-EXAMINATION.

BY MR. FOGWELL:

Q. Mr. Mastros, the third settlement proposal—you did put it together, did you not?

A. I believe I did, yes.

Q. And you presented it to Mr. Sol Pinsley?

A. Whether I presented it to him, or sent it in, I don't know. I presented one of the proposals to him.

Q. And then subsequent to his signing it you forwarded it on to secure payment, in effect?

A. I usually wrote the letter of transmittal and sent or handed him the whole package. Now, if it was sent by the clerk in there, I don't know.

Q. If it was ——

A. If it was sent by the clerk in there—I don't recall what happened to it later.

Q. Well, in any case, the proposal was drafted under your supervision?

(418) A. That is correct.

Q. And then forwarded on in the regular course of business?

A. To my knowledge, yes.

Q. Now in this settlement proposal, the third one, which asks for some $170,000 worth of engineering labor, including overhead, it was a settlement proposal, was it not, as the name implies?

A. Yes, it was a proposal.

Q. That is, a proposal to settle this contract with the Government on the basis of the amount requested therein or cited therein; correct?

A. Yes.

Q. Therefore, I suppose that both at this company and also at Hazeltine you had supervised the preparation of other settlement proposals; had you not?

A. I didn't supervise the preparation of proposals in Hazeltine, because Hazeltine had a legal department and the cost department, the cost accounting department, was separate, and they prepared the cost information. I went through the overhead computations and negotiated and established a rate of overhead, but I did not go through the entire—it passed from my desk.

Q. Let me shorten it just a bit. You were familiar (419) with settlement proposals in general, let us put it that way?

A. Yes, I had some familiarity with proposals.

Q. On renegotiation of contracts, so to speak?

A. On termination of contracts, you mean?

Q. Well, renegotiation and/or termination?

A. Well, renegotiation I did not take part of.

Q. Well, in any case, as in this company's termination, right?

A. Right.

Q. And you knew, of course, as a good accountant, that it was wise and only fair to your company to put in all costs in the termination proposal, did you not?

A. Yes, all costs that I believed they were entitled to.

Q. Right; and, accordingly, you so did?

A. Yes, sir.

Q. In your previous experience with termination proposals or settlement proposals and termination of contracts how many had you had to do with before, let us say generally, roughly?

A. Now, you are talking about previous companies?

Q. No, either Espey or Hazeltine or anywhere else?

A. Well, at Espey I filed two proposals. I had a (420) predecessor who filed—two proposals filed by my predecessor at Espey, two small settlement proposals. At Hazeltine there must have been about thirty proposals that they had filed.

Q. So is it fair to say, Mr. Mastros, that in the court of your experience as an accountant at Espey and Hazeltine you had to do with thirty or forty settlement proposals?

A. Well, I had something to do with it, yes.

Q. And, of course, you were familiar with it, how they worked, and all?

A. Well, I would say generally familiar, not entirely familiar.

Q. Of the thirty or forty that you had to do with, how many of them that you made up, if any, got audited as closely as this one?

A. I don't recall.

Q. Well, in the majority of them actually the settlement proposals were paid, were they not?

A. That I don't recall either.

Q. The $170,000 or $180,000 worth of engineering labor and overhead which you submitted in this third proposal came, as you told the ladies and gentlemen of the jury, from your modification of the daily time card sheets, the (421) weekly, monthly, and so on; is that correct?

A. That is correct. I had issued the order to my cost accountants to make the corrections, to make the corrections, in the usual way.

Q. And the $170,000 or $180,000 came from that modification; correct?

A. Correct.

Q. If the settlement proposal had gone through, the third one that you prepared, that was filed—if it had gone through and the amount had been paid, rather than audited in minute detail, would you have told the Government of this modification of all these time cards and time payments arbitrarily?

A. Well, I don't know whether I would or would not. At any rate I believed that that was what the company was entitled to.

Q. I don't want to press you unduly, but if the third settlement proposal had been paid in the normal course of affairs, the company for which you were controller at $15,000 a year would have received some $170,000 or $180,000 more than the time cards, the time sheets, and any and all accounting records justified; isn't that correct?

A. If they had received that money ——

Q. Would you mind answering yes or no; then explain if (422) you wish to. The question is, isn't that correct?

A. Well, would you repeat the question, then?

MR. FOGWELL: Well, maybe we can indulge Mr. Homan.

(Question read by the reporter.)

THE WITNESS: No.

MR. KOSSMAN: I object to that question.

THE COURT: He says no.

THE WITNESS: No.

BY MR. FOGWELL:

Q. Well, you did modify all the time cards and time sheets, did you not?

A. The cost department corrected these records.

Q. Under your direction?

A. That is correct.

Q. And there is no question in your mind but that you told them to increase the time cards from other jobs to increase the amount of time on this job; isn't that correct?

A. That is correct, because this job was absolutely ridiculously low in engineering; it was impossible; and in view of the fact that the cards were haphazardly made, made up by the clerks themselves, they were correcting their own records.

Q. Mr. Kossman asked you if you were in the service. (423) You were in the service only two or three or four months; isn't that correct?

A. No, it was close to six or seven months.

Q. And you are how old now?

A. Forty.

Q. You were born in New York City?

A. Yes, sir.

Q. And went to New York University?

A. Yes, sir; nights.

Q. You went with this company about the first of August, 1952; is that right?

A. I believe it was the last two days of July that I went to work for them. They sent me a rush call that they wanted me to join them immediately.

Q. You say you started out at a salary of $200 a month or $10,000 a year, give or take a little?

A. That is correct.

Q. And once you went there your title was controller?

A. The title was controller.

Q. And you held that title for the entire three and a half years you were with the company?

A. Yes.

Q. You say that when you first went there—well, you got your salary raised from $200, or $10,000 a year, (424) to $300 a week, or $15,000 a year, give or take a little, about a month after you got there?

A. Yes.

Q. You say you found certain irregularities that you did not like?

A. That is correct.

Q. And I suppose a good accountant, auditor or controller would set about endeavoring to rectify that; is that correct?

A. Yes, sir.

Q. As controller you were in charge of the accounts of the company, were you not?

A. Yes.

Q. You had been with Hazeltine for how long?

A. Eight years.

Q. Well, from what year to what year, roughly?

A. July, 1944, to July, 1952.

Q. You told the jury something about a Saratoga Division starting in 1952 for Espey; is that right?

A. Yes.

Q. Now, you also told the jury that certain records were lost in the Saratoga Division; is that right?

A. I didn't—what jury?

Q. I beg your pardon.

(425) A. What jury?

Q. This jury right here.

A. I didn't say anything about records being lost.

Q. I beg your pardon if you didn't. Isn't it correct that a large number of the Saratoga time cards were, in fact, lost?

A. Yes; that is what the Espey told me. I don't know how they got lost or anything about it, but I know Mr. Miller wanted those records, and when I tried to get them for him I couldn't find them.

Q. Did you ever get this McBee System installed?

A. No, I did not. As I stated, they were practically thrown out by the individuals up at Saratoga.

Q. You told us that you discussed these certain difficulties with Mr. Barbarone. What was his title?

A. He was the supervisor of the cost section.

Q. He worked for you, so to speak?

A. Yes, and he was with the company for about three years, I think, before my time.

Q. He was the supervising cost clerk?

A. Yes, he was the supervisor of the cost section.

Q Under the controller?

A. Right.

Q. And you say that you discussed with him, when you (426) came to prepare this termination proposal, the fact that you thought the engineering labor was rather low; is that right?

A. That is correct.

Q. Are you going to have Mr. Barbarone here?

MR. KOSSMAN: Oh, come! I object to that question.

THE COURT: Objection overruled.

THE WITNESS: I would have liked to have had him here. I wish he was here; but they all claimed privilege. He would have helped my case very much.

BY MR. FOGWELL:

Q. Have you talked to him of late?

A. Yes; as a matter of fact he did speak to me about the F. B. I. wanting to question him, and I asked him to please go down and see them, and instead, he said, well, he was thinking over contacting Mr. Morris Pinsley.

Q. Now, you had, of course, in the company a number of engineers, did you not?

A. Yes.

Q. And one of those engineers was Mr. Robinson?

A. Yes.

Q. The chief engineer was a man named Sack; is that right?

A. That is correct.

(427) Q. Mr. Sack, of course, was an official of the company or an executive of some type, was he not?

A. Yes, he was a vice-president.

Q. And, accordingly, his salary or any activities that he did would have come out of overhead rather than engineering costs?

A. Yes, he charged his salary to overhead.

Q. Well now, Mr. Mastros, I am not an accountant, and correct me if I am wrong: What would come out of overhead other than rent, light, heat, executives' salaries, and so forth?

MR. KOSSMAN: Engineering overhead?

MR. FOGWELL: General overhead.

THE WITNESS: What would come out of overhead?

BY MR. FOGWELL:

Q. Yes, what would be included?

A. Oh, any administrative payroll and what they call in-

direct payroll that was unallocable to particular projects or contracts or jobs.

Q. Can you name an item or two other than rent, light, heat, executive salaries, let us say?

A. Well, let us say the porter's time is charged to overhead; he can't be charged to a job because he didn't (428) work on it; he worked for the plant in general.

Q. Actually, you told us you used your judgment in applying 2 per cent of engineering labor in preparing this settlement proposal, just arbitrarily, rather than from the time cards; is that right?

A. Well, I couldn't work from the time cards.

Q. I understand, but that is what you did, isn't it?

A. I used the percentage basis; yes.

Q. Right. Now, actually, Mr. Mastros, at Espey didn't you find that each contract offered considerable—namely that contract A would have a much higher quantity of engineering than contract B, for instance?

A. No, not necessarily. They had mainly one type of contract which was production with a little engineering involved, and their contracts ran between 2 and 3 per cent.

Q. All of them?

A. Yes, sir.

Q. You mean they were none less than 2, none more than 3?

A. Well, there were less, because if you take the RCA projects, RCA would submit the drawings and sample that they are marketing at the time, and all you had to do was reproduce it; there was very little engineering on it; and another thing is the small amount of radio business (429) this company did. There was no engineering on radios; in other words, they used the same old model year in, year out.

Q. They just changed the style of the case?

A. Not the case; they didn't make any cases; just the dial plates or the color.

Q. So you say you found a uniformity of engineering labor rates at Espey; is that correct?

A. I would say so, yes.

Q. Did you find that also at Hazeltine?

A. At Hazeltine, if it was strictly a development contract, the rate could be, oh, 35—40 per cent of the contract price. Now, that was strictly a research problem. But to my knowledge, and as I recall, I used to jot down these percentages. Their production in engineering contracts ran somewhere in percentage around 2 per cent, 3 per cent.

Q. Was the same degree of uniformity in effect?

A. Yes, they generally had about the same type of contracts except for the research projects.

Q. I think I heard you tell the jury while at Espey, Hazeltine and other companies you worked for, you had a job number for each job; is that right?

A. At Espey we had a job number, yes.

(430) Q. Like 381, 281, 481, and so on?

A. That is correct.

Q. And when a job came in is it correct that you had a foreman in charge of each job?

A. That is substantially correct.

Q. I thought you told the jury a few minutes ago that there was an engineer assigned to each contract.

A. Well, you said foreman, so I said "substantially correct."

Q. Right.

A. A project engineer; yes.

Q. To each job?

A. Correct. He acted similar to a foreman.

Q. Do you recall, Mr. Mastros, the engineer or foreman who was assigned to Job 381?

A. I found out—I don't remember the time I found out—but I believe Mr. Robinson was one of the engineers, and then Mr. Petker took over. Now, when they took over from one another, I don't know.

Q. Well, you determined that in your judgment the engineering was low. Did you discuss that with the engineer in charge of the job?

A. As I stated before, I don't recall just when I discussed it. I did mention it to Jack Petker. Now, just (431) when I did, I don't recall, and I recall asking him, though, about the charges to this job. I mentioned this $2300 worth of engineering on this job. Incidentally, engineering involves drafting and model shop also.

Q. What I want to know how—excuse me.

A. Yes.

Q. What I want to know now is, did you discuss that problem with Mr. Petker?

A. I didn't discuss it as a problem; I mentioned it to him; and he believed that this contract should have at least $60,000 engineering, and then I said—I don't know whether he was the same time, but he was busy taking inventory on his shop, and I said, "Jack, don't you remember any of the engineers on this job or who you were working with?"

Well, he says, "There were quite a number, but then this job was running before my time. There were a lot of engineers there."

Q. Mr. Petker was the engineer on this job?

A. Mr. Petker was the engineer on this job; yes.

Q. And you in preparing the termination proposals felt that engineering was low?

A. That is correct.

Q. Your background is that of an accountant; is that (432) right?

A. Yes.

Q. Notwithstanding all that, you did not ask Mr. Petker, the engineer—you did not go into this in any great detail with him?

A. No; he couldn't give me the information I wanted, and there was the time factor involved here; we had to get the proposal completed.

Q. Well, how long, roughly, did it take you, Mr. Mastros, to prepare these termination proposals, the third one particularly?

A. The third one, of course, was—the reason we prepared

the third one, you know, was because we had to revise and reconstruct the overhead for 1951 and 1952, and there was nothing done on the other charges except for the overhead.

Q. Well, you decided—excuse me; I am not sure you answered my question. How long, approximately, did it take you to prepare the third settlement proposal? An hour, a week, two weeks, a month, two months, a year, roughly?

A. The third settlement proposal we took two months to make up.

Q. A couple months?

A. Because we had to reconstruct the overhead for 1951 (433) and 1952.

Q. Notwithstanding the fact that it took you two months you did not even ask the engineer on the job, which would have taken you less than ten minutes, how much in detail the engineering labor could be on the job; is that right?

A. I didn't change the engineering charges at that point.

Q. I understand, but at any point once you had prepared this, you knew you had an accounting background, you were not an engineer; notwithstanding that, you without any engineering judgment arbitrarily sent a bill to Uncle Sam for some $70,000?

MR. KOSSMAN: I object to the word "arbitrarily".

THE COURT: He can say whether it was arbitrary or not; it is cross-examination.

MR. KOSSMAN: I withdraw the objection.

THE WITNESS: No, I couldn't get the information.

BY MR. FOGWELL:

Q. You told us you had certain discussions with Mr. Weiss about the hardship claims; is that right?

A. Yes.

Q. I think you also told us that you advised Mr. Weiss "I had no part in that claim"; is that right?

(434) A. The hardship claim.

Q. Now, when you attended the hardship hearing in September, 1952, you had only been with the company a month or two; isn't that right?

A. That is correct.

Q. And accordingly, I suppose, regardless of how well qualified you were in accounting, being new to the company, a great deal of the information that you heard was new to you; is that right?

A. Yes.

Q. And you didn't have any idea whether it was true or untrue? You had no personal knowledge of the veracity or lack of same, did you?

A. No, I didn't.

Q. I think you told the ladies and gentlemen of the jury about some conversations with Mr. Hollis in May, 1953; is that correct?

A. Yes, sir.

Q. You told him to submit the engineering to whom? I missed the name.

A. I asked him—well, I told him not to pass on the engineering but to submit it to the contracting officer; to take exception to it and to submit it for further consideration to the contracting officer—in other words, (435) to use it as a basis of negotiation.

Q. You heard Mr. Hollis say in court here, did you not, the other day, on direct examination, that you had advised him not to go to anyone in the office other than yourself?

A. I heard him say that, and it is entirely wrong, because I assigned Mr. Herbert Potaker to work with Mr. Hollis and Mr. Potaker prepared schedules and gave him any photostat copy of the records he wanted.

Q. So Mr. Hollis was not telling the truth?

A. Mr. Hollis did not admit he had 381E in front of him.

Q. Notwithstanding that, you didn't ask Mr. Hollis anything about that on cross-examination?

A. Well, I asked my attorney to hold him here, but he said he didn't need him.

MR. KOSSMAN: If the Court please, I object to asking the defendant about asking questions on cross-examination.

THE COURT: Yes, I think that is well taken.

BY MR. FOGWELL:

Q. I think you told the jury about returning to the Government a sizable check on a partial payment in another contract; is that right?

A. That is correct.

(436) Q. I think you said that you discussed this matter with someone at the Signal Corps by telephone; is that correct?

A. Yes, sir.

Q. I think you gave us the benefit of two names. What were they again?

A. J. H. Rosenberger or Nathan Gerber.

Q. Are you going to have either of them here today?

A. No, I didn't think it was necessary. I meant, if you wanted to check, if they are in the vouchering section, that is all in the record.

Q. You returned the $200,000 check. What did the Government do with it? That was this special payment you spoke about.

A. Yes, sir.

Q. When was it that you went to Mr. Grossman over at his office and asked the status of this 381 contract?

A. That was in the first part of October.

Q. How long did it take you, approximately, and the cost clerks under you, to correct all these daily, weekly and monthly time cards?

A. Well, it is hard to say, because they were doing their regular work and also pulling out all the invoices on the materials on this job, and that was quite heavy.

Q. It must have been quite a job, was it not?

(437) A. The invoices were quite heavy. The total job was quite a job, yes.

Q. And it must have taken ——

A. And it was the same way with any small contract, and the same way with a price redetermination—we had to pull all the invoices.

Q. It must have taken you some while, did it not—you and the clerk under you?

A. Well, it took them exactly one month to do all this work on the cards, and then they later had corrected the related records. Now, I don't know how long ——

Q. Did they do this mostly in March, 1953?

A. They did most of it in March, and they continued through April, I guess, or some month after that; I don't know. I just don't know when they completed the work, but I know that the papers were out on the desks for quite some time, and I could only give you my guess.

Q. Was this done in connection with regular work or at nigh or both?

A. Well, we always had overtime and this work would be done during the day and in the evening with the regular work.

Q. Now, I think you told us that the present settlement proposal, pursuant to your present knowledge, is about $1,400,000; is that right?

(438) A. That is correct.

Q. And you left the company in December, 1955; is that right?

A. Yes, December 5, or 4, or 3—anyway, it was a few days in December.

Q. Now, your salary was originally $200; then went to $300. When was it reduced to $200?

A. The salary was $200. As a matter of fact, it did not come out $200, but he gave me $200 and said if it was O.K. with the salary stabilization situation your salary is $15,000 or $300 a week, and that was one month later he said, "Increase the salary to $300."

Q. I understand that, but maybe you did not understand my question. When was it that you were reduced to $200, if at all?

A. In 1955. Sometime at the beginning of 1955.

Q. Do you recall when, approximately?

A. Well, it was in the first quarter, I think; sometime during the first quarter.

Q. February, March? Where is the Majestic Radio Company?

A. 79 Washington Street, Brooklyn.

Q. Are you a stockholder in the company?

A. No.

Q. Who does own the company?

A. You are talking about Espey?

(439) Q. No, no, Majestic.

A. Oh, frankly, I don't know; it is a publicly held corporation.

Q. Does it do some contracting with Espey?

A. No.

Q. Are you sure?

A. As far as I know, they do not. This is Majestic International; they import radios from Germany.

Q. You told Mr. Spiegel at the Grand Jury about certain differences between this and another type of contract. What was the other type you mentioned?

A. Research.

Q. I think you told him that a research contract would require a great deal more engineering than a manufacturing company, did you not?

A. That is right.

Q. Now, I show you the letter attached to G-8, which is the third settlement proposal—your letter on the bottom of it here—that is your signature, is it not? Showing you the 1 at the back of G-8.

A. That is correct.

Q. And the little GM/a1 in the lower lefthand corner indicates that you dictated the letter?

A. Yes, that could be, or I could have written it out.

(440) Q. And have a secretary type it and present to you for signature, in any case?

A. Yes.

Q. Now, on next to the last page of this, and on the last page, it has listed here "Name of supervisory accounting official, George Mastros." You are the one referred to there, are you not?

A. Yes, sir.

Q. Controller?

A. Yes, sir.

Q. And the letter at the back of G-7—this is also your signature, is it not?

A. Yes, sir.

Q. And the letter attached to G-6, which is the first settlement proposal, that is also your signature, is it not?

A. Yes.

Q. How many models were made for this job, if any?

A. How many models? I believe there were about two.

Q. Two. And this original job was for how many? How many thousand of these tank radios was it for?

A. It states so on the exhibits on the front page.

Q. You don't recall?

A. I don't recall.

Q. Is it on the original contract?

(441) A. No, I am talking about the exhibits you have just talked about.

Q. If I gave you the third settlement proposal could you find it? Do you understand my question? It is, how many of these were to be produced, bearing in mind, as I understand it, that none were ever really produced because the contract was stopped?

A. That is correct; they had received approval and were getting into production. These are AN/GRA-6, Instruction Books and Maintenance Parts, 18,000 units.

Q. Then to boil this all down, all of the engineering labor was purely your estimate?

MR. KOSSMAN: I object to that question.

THE COURT: Objection overruled.

THE WITNESS: The engineering laboratory ——

BY MR. FOGWELL:

Q. Well, now, excuse me; would you answer yes or no, and then explain? I think the judge will agree that that is the proper way to do it.

A. Well, yes, based on certain facts. Now, I couldn't get the information from the engineers. Even if I had questioned the engineers, they didn't remember what job they worked on two weeks ago. I had used the only factor I could find. I knew there was engineering on this job, (442) from the hardship hearing. There were definite statements on that, and the company itself shows an average of 3 per cent down—3½ per cent down to 2 per cent engineering on contracts—and also, from my past experience, I know that all these types of contracts have to have some engineering on them, at least 2 per cent.

Q. But in any case, not to press you unduly, the fact is this, that it was purely your estimate.

MR. KOSSMAN: I ——

THE WITNESS: Well, it is not purely an estimate; it was the best information available.

BY MR. FOGWELL:

Q. I understand, but it was your estimate, was it not?

A. I didn't regard it at the time as an estimate; I don't regard it as an estimate now.

Q. Then what do you regard it as?

A. I regard it as a reasonable assumption based on the

fact that the company's rate of engineering on contracts was at least 2 per cent.

Q. I don't question that. There wasn't any factual or paper work basis for it, was there? Whether it was your estimate or assumption there was no time card or other basis for it, was there?

A. All the paper work concerned was wrong.

(443) Q. Answer the question yes or no; then explain, if you can.

A. Well, there was no paper work. If you mean, was the $80,000 or $70,000 on paper, no, it was not on paper.

Q. Now, you directed these cost clerks to take the time, so to speak, out of some forty-seven other jobs, was it?

A. Forty some odd jobs, anyway.

Q. On the sheet which you prepared for Mr. Miller ——

A. Yes.

Q. —it itemized the jobs in some detail, did it not, where the hours came from?

A. That is correct.

Q. And it totaled some $77,000?

A. This was arrived at from the old papers and the corrected papers, the difference between the two.

Q. Now, did you tell the time clerks to start roughly with what date and stop with what date removing time from these other contracts?

A. Yes, as I had stated, we established the date that we should start on and the date we should end on.

Q. Could you give us the benefit of those two dates now?

A. Yes, it was August, 1950, to May, 1952.

Q. Well, why did you go to all the difficulty of modifying the records, job cost ledger sheets, monthly summaries, (444) and daily time card summaries? Why did you go to all that trouble to do all this rather than just formulate your—whatever you want to call it—your estimate or assumption, and then make journal and ledger entries accordingly?

A. To make a journal entry you still have to have the

same job done. You have to go through all the time cards anyway.

Q. You mean it could not have been done by just making journal entries?

A. No, no; you would have to go through your cards and make this journal entry with all the corrections to the records.

Q. I don't follow you, but, as I say, I am not an accountant; but do I understand your statement now to be to the jury that it would have been impossible to put the $77,000 into this settlement proposal ——

A. Yes.

Q. —merely by making journal entries?

A. You have to go over the jobs to find out where you are going to transfer from, which the clerks did.

Q. Couldn't you have transferred it by journal entry from the other contracts in question?

A. Yes, you could do that, but it is the same amount of work—as a matter of fact it is additional work—and (445) in any case they would never use journal entries. This company did not use the journal entries to make that type of correction.

Q. But it would have been much less work, wouldn't it, by journal entry rather than erasing all these cards, which was a monumental job?

A. No, sir.

Q. It would have been ——

A. The same thing.

Q. —the same amount of work?

A. Same amount of work.

Q. To do it by journal entry or to go back and erase all these things?

A. Right.

Q. Now, I show you this G-10 which is a schedule of accounting information which was filed, I think, in support of the amended settlement proposal. Am I right?

A. Beg your pardon?

Q. The amended settlement proposal which you prepared in February, 1954—is that right?

A. Yes, that was filed with the proposals.

Q. Is that accounting data to back up that proposal of February, 1954?

A. Proposal of February, 1954?

(446) Q. Yes. That is what that is, isn't it?

A. Well, it is a schedule of accounting information—accounting information to back up any scheduled settlement proposal.

Q. Right. Would you turn to the bottom of the fourth page. That is your signature on the bottom, is it not?

A. Yes, I signed it.

Q. Would you notice here the third question—you not only signed it, but you certified it. Didn't you say here, "I hereby certify that, to the best of my knowledge and belief, the above statements are true and correct"?

A. Yes.

Q. This third question here which says, "Independent accountants, if any, who have reviewed or assisted in the preparation of the attached proposal"—you list there "Kalish, Rubinroit & Co., 280 Broadway, New York City." Is that true or untrue?

A. I just copied this schedule from the previous accounting information. They had other proposals and I compared one with the other and copied the same down the line. They are supposed to audit the proposal. I don't really know if they did.

Q. I don't mean to press you, but you don't know whether they assisted in the preparation?

(447) A. No, but I put that in there for the purpose of any public auditing agency to know who the public accountants were in case they wanted information, and at that time I didn't know whether they would audit the next day or the next month, but they are supposed to audit this claim.

Q. Well, again, I don't mean to press you, but notice the

grammar. It says "Who have reviewed or assisted in the preparation". Actually, they say "reviewed" or even "assisted"; is that correct?

A. Well, actually I don't know; they hadn't assisted me. I don't know, but I simply copied the information that was on previous accounting information schedules.

Q. Did you follow regular accounting procedure, so to speak, or did you have what you thought was your own regular accounting procedure at Hazeltine?

A. Yes, Hazeltine had their own procedures in accounting, yes.

Q. Was it a good one?

A. I think it was pretty good.

Q. You were there for eight years, were you not?

A. Yes.

Q. Did you ever in Hazeltine ever have to go back and erase monthly, weekly, daily time cards?

A. I didn't erase them personally, no.

(448) Q. Were they ever erased in that company, to the best of your knowledge?

A. Well, to the best of my knowledge they didn't—they could have corrected ——

Q. When you went to Espey had you ever erased other time cards prior to this Job 381?

A. None that I know of.

Q. You had not, had you?

A. None that I know of. I mean, you are talking about me personally, or my orders?

Q. Well, either.

A. No, I had not ordered any changes.

Q. So that your practice for some eight or ten years at Espey and Hazeltine, and so forth, prior to the preparation of this Job 381 was not to modify daily, weekly, monthly time cards, so to speak; is that correct?

A. Well, at Hazeltine we had quite a tight system, quite a tight system, and there was no necessity for any changes between jobs. There could be corrections within a week

that may be made by the individual himself, and those time cards were signed by the individuals themselves and prepared by the individuals themselves.

Q. Again, I don't want to press you, but I would like to ask you again, and I think Judge Ganey will admonish you, (449) if I don't—I would like you to answer the question yes or no and then explain it as you wish, but I think it presents a clearer picture to the jury. My question is, in the eight or ten years prior to the modification of the time cards here had you done it either at Hazeltine or at Espey?

A. No.

Q. So that it was not your general accounting procedure?

A. Well, at Hazeltine, as I stated ——

Q. Wait, please ——

MR. KOSSMAN: Wait; he answered "No." Let him give his explanation.

THE WITNESS: There was never any reason to.

BY MR. FOGWELL:

Q. All right, I understand.

A. We had a tight system. People cooperated there. People would do their own time cards there. They signed them. If corrections were made, they were made by the people themselves.

Q. So that prior to this 381 time card modification program you had not considered it your usual practice before; is that right?

A. Not my practice, no.

(450) Q. You had not considered it your regular accounting practice; is that right?

A. You say "My practice", but I was not confronted with the situation prior to this point.

MR. KOSSMAN: I object to asking any more. I think the witness ——

MR. FOGWELL: It is a very important point, Your Honor.

THE COURT: He said no. I don't see why you press it. He never did it. It makes no difference whether he did or not.

BY MR. FOGWELL:

Q. You say you never did it before. I want to read you G-10, which you signed, which says in this accounting information, "Have there been any significant deviations from your regular accounting procedures and policies in arriving at the costs set forth in the attached proposal?" And you say no.

A. Correct.

Q. You did say no, did you not?

A. That is right. In that, you are talking not about my procedures, you are talking about Espey procedures.

MR. KOSSMAN: If the Court please, I object to this kind of misleading question. This is not his (451) personal history. This is based on—it tells you right here—Espey Manufacturing Company, and when they ask about accounting deviations it refers to the company itself.

MR. FOGWELL: Your Honor will bear with me. I think it is cross-examination and a terribly important part of the case.

THE COURT: Repeat the question again, if it is so terribly important.

BY MR. FOGWELL:

Q. "5. Have there been any significant deviations from

your regular accounting procedures and policies set forth in the attached proposal?"

"No."

THE COURT: Let me see that.

MR. KOSSMAN: I will withdraw my objection, if Your Honor please. Because the assistant district attorney argues it is important, I will withdraw my objection.

THE COURT: Yes, I think you should answer that.

BY MR. FOGWELL:

Q. You did say "No"?

A. I said "No", and the reason is that Espey's procedure was to correct the records in this fashion. I asked that question of the cost accountants. There was no major (452) deviation from the system they used there.

Q. From which cost accountant did you get it?

A. As I stated before in my testimony, Mr. Barbarone or any of the accountants will tell you that in Espey.

THE COURT: We will have to recess. We will recess until two o'clock. Ladies and gentlemen, do not discuss this case with anyone nor permit them to discuss it with you. Be in your seats at two o'clock.

AFTERNOON SESSION.

GEORGE MASTROS, resumed.

CROSS-EXAMINATION (Continued).

BY MR. FOGWELL:

Q. Now, Mr. Mastros, you have engineering costs broken down into three headings, as I see them; first, expended material some $9,098, engineering costs for labor some $80,096, and engineering overhead some $92,000. The expended material, I assume, is part of the engineering cost that went into the two models that were made.

A. That cost was the difference between the physical inventory and the total merchandise received, and there was approximately $9,000 worth of materials which had been used and which were lying up in the engineering laboratories, (453) and therefore we charged them to engineering.

Q. Now this G-10, schedule of accounting information in support of the fourth proposal—this is the one that before the lunch hour I think you said was your signature over the words: "I hereby certify that, to the best of my knowledge and belief, the above statements are true and correct," and that you executed on March 31, 1953; is that right?

A. That is correct.

Q. And that was the same month that you and the cost clerks, or rather they under your supervision, had made some very extensive changes in the time cards, daily, weekly, and so on; is that right?

A. That is correct.

Q. You will have to speak up so the jury can hear you. Now, in Question No. 8 here you said that all of the costs were "based on actual costs", did you not?

A. That is correct.

Q. And in Question No. 23 you said, "Engineering time

that can be applied to particular projects are allocated to those projects. Time that cannot be allocated to any particular project, general in purpose, is charged to overhead"; did you not?

A. That is correct. In other words, the overhead portion (454) is applied by a percentage and direct labor as such is charged to the particular projects. In other words, it just means the segregation between overhead items and direct items.

Q. You testified on April 27 and 28 right here in this courthouse, did you not, under oath, under questioning by Mr. Robert Spiegel, another assistant district attorney?

A. Yes.

MR. KOSSMAN: The year?

MR. FOGWELL: April 27 and 28, 1954. Is that right?

THE WITNESS: I assume it is right. It was around that time.

BY MR. FOGWELL:

Q. And in that you said that you had formal education in accounting at New York University.

A. Yes.

Q. And that you had been with such companies as American Beverage, the John Morgan Corporation, and General Bronze always as an accountant; is that right?

A. Yes.

Q. And that you were at Hazeltine for eight years, and at Hazeltine you had charge of accounting; is that right?

A. That is correct.

(455) Q. And while there you did considerable work on the accounting papers and straightened them out a great percentage of the way; is that right?

A. That is right. It took about a year to install all the procedures that I wanted.

Q. I think you told Mr. Spiegel a termination claim is actually named a settlement proposal; is that right?

A. Well, I think he asked me what I had before me. I think he mentioned claim, and I think I said it is actually called a settlement proposal.

Q. While at Hazeltine actually the only things you put in were the actual costs; not estimates?

A. Yes, at Hazeltine I assumed they were actual costs.

Q. And you never——

A. Although the cost accountants had prepared the costs.

Q. And at Hazeltine if you ever had any question, instead of using your own judgment or estimates or appraisals, as you did in this case, you would have the project administrator make the decision; is that right?

A. I would have the cooperation of the project administrator; yes.

Q. I understand. That would have been your regular procedure at Hazeltine to have the project administrator (456) approve the same, would it not?

A. That is on material, yes.

Q. In other words, you felt his judgment as project engineer would be superior to yours as accountant?

A. No, these project engineers had their jobs, and they had the figures presented to them each week.

Q. I don't question that.

A. As the job progressed, and they were in a much better position to know what was going on in that job.

Q. Well, I am not questioning that. In engineering they were in a much better position to judge than an accountant, were they not? Doubtless the adverse is true that you would in accounting be in better position to judge than they?

A. Yes, yes.

Q. Now, in the grand jury notes, as I see it, you were asked by Mr. Spiegel: "How were these settlement proposals filed?

"A. We filed one settlement proposal, I believe it was the beginning of April.

"Q. 1953?

"A. 1953. It was dated March 31, 1953. I prepared the proposal and submitted it.

"Q. Was it mailed?

(457) "A. I believe it was."

You did tell Mr. Spiegel that, did you not?

A. I imagine I did. I actually don't know. I said I believe it was; I am not sure.

Q. Now, Mr. Spiegel asked you, "Do you know whether these were mailed from New York to Philadelphia?" And your answer was, "I believe they were." Is that correct?

A. Well, in the regular course of business, actually I didn't mail it, but if it was mailed, it was mailed outside of my knowledge.

Q. It was mailed what?

A. Outside of my knowledge. I mean as a normal course of business it may have been mailed.

MR. KOSSMAN: Excuse me; are you asking him whether he said that before the grand jury? Because of course, what is in there he said.

BY MR. FOGWELL:

Q. Well, my question to you now is, are you now telling us that you did prepare it and to the best of your knowledeg it was mailed in the regular course of business.

A. Well, if that is there I must have said it.

Q. No, I didn't mean that it was here. To rephrase the question, my question to you is, are you now telling us that you did prepare these three settlement proposals in (458) the regular course of business?

A. Yes.

Q. And that in the regular course of business they were mailed from New York to Philadelphia here?

A. Well, I assume they were.

Q. Now, did you tell Mr. Spiegel, wherever he asked you,

"Do you know who mailed them?"—did you say, "Well, either the people that took care of the mail—I mailed one of them myself"? Did you tell Mr. Spiegel that?

A. I may have told him that, however, I was thinking of subcontractors—I might have mailed the subcontractors' portion. There were many papers going back and forth and I took care of the subcontractors' claims.

Q. Let us start back a little further. In any case you prepared all three of the settlement proposals?

A. No. 1, No. 2 and No. 3.

Q. They were all prepared by you?

A. That is right.

Q. Or under your supervision; is that right?

A. That is right.

MR. KOSSMAN: I am willing, to save time, to have him read whatever was said there and stipulate that that is correct, rather than have him repeat it.

BY MR. FOGWELL:

(459) Q. Mr. Spiegel, as I read it, said to you, "Do you know whether these were mailed from New York?

"A. I believe they were.

"Q. They were mailed to Philadelphia?

"A. Mailed to Philadelphia.

"Q. Do you know who mailed them?

"A. Well, either the people that take care of the mail—I mailed one of them myself."

Is that what you told Mr. Spiegel?

A. Well, if it is there I must have told him.

Q. I will show it to you.

MR. KOSSMAN: If it is there, he said it. We might as well save time.

BY MR. FOGWELL:

Q. In any case, you had complete charge of the settlement proposals; is that right?

A. That is correct.

Q. And you had under you three cost clerks, Barbarone, Potaker, and Silvers?

A. Yes.

Q. Now, your 2 per cent estimate ties in, to a degree, with the $170,000 rough figure?

A. Approximately.

Q. And that would be 2 per cent of about $3,600,000 (460) which was the original flat cost of the contract; is that right?

A. Right.

THE COURT: Before we go into that—this is very vague—let me understand you, and let the jury understand you so that we have no doubt about it at all. When you wrote this covering letter enclosing this third termination settlement, was it your intention—it was addressed to the Signal Corps in Philadelphia; am I right?

THE WITNESS: I believe so.

THE COURT: Let us not have any doubt about it. You wrote it, and you ought to know to whom you addressed it. Don't you remember to whom you addressed it?

MR. FOGWELL: It is addressed to the Signal Corps Supply Agency, 225 South 18th Street, Philadelphia, Pa.

THE COURT: Do you remember that?

THE WITNESS: Yes, sir.

THE COURT: Did you dictate that letter?

THE WITNESS: Yes, sir.

THE COURT: Now, was it your intention that that letter go to the Signal Corps when you addressed it? What was your state of mind? To whom was it to go?

THE WITNESS: I either left it with Mr. (461) Pinsley or the clerks.

THE COURT: I didn't ask you that. I want you to answer me. I ask you, what were your intentions? What was your state of mind when you directed that letter? To whom was it to go to be presented as a claim?

THE WITNESS: To the Signal Corps.

THE COURT: To the Signal Corps. You say you cannot remember whether you mailed it personally or whether it was mailed by someone else; is that correct?

THE WITNESS: That is correct.

THE COURT: Now, did it follow the usual custom or business practice of your office or the office of the company? Was there anything exceptional about this letter which was written or dictated by you, and according to you, your state of mind, was to reach the Signal Corps in Philadelphia? Was it done in the usual course of business?

THE WITNESS: It was done, yes, sir, during business hours.

THE COURT: Was there anything different in this from any other letter that you wrote to someone?

THE WITNESS: Not that I know of.

MR. KOSSMAN: If the Court please, if there is any

question about this I am perfectly willing to (462) stipulate that this was written by him in the ordinary course of business, and in the ordinary course of business it was to be mailed to the Signal Corps; no doubt about it.

THE COURT: And that it reached the Signal Corps.

MR. KOSSMAN: Of course, it reached the Signal Corps.

MR. FOGWELL: In Philadelphia.

MR. KOSSMAN: In Philadelphia.

THE COURT: We have that straightened out. We have to have his state of mind and the person to whom addressed. The object ——

MR. KOSSMAN: And that he wanted it to reach them.

THE COURT: That is right. All right.

BY MR. FOGWELL:

Q. Now, you say today—my question to you now is, was there one model prepared, or—I don't want to mislead you. You told Mr. Spiegel there was at least one that you know of. Do you know whether it was one or two, or don't you know?

A. I am not sure, but I know that Mr. Petker said that the model we had in front of Mr. Hollis was an extra one, and they had one up in the laboratories, so I assume there (463) were two.

Q. Now, before you created these estimates or appraisals or whatever you call them you did check the job cost ledger sheet and find there was just about $2300 listed for engineering labor, did you not?

A. Yes.

Q. And it is that figure that you raised by estimate in the termination proposal to the sum of about $75,000?

A. We had the figure corrected to approximately $30,000. We didn't touch the original twenty-three. We set up as part of the total contract about $77,000 on the side.

Q. Now, the three cost clerks that you directed to do this job—am I correct that you were asked by Mr. Spiegel:

"Q. How did they know which contracts to take it from?

"A. They did it at random.

"Q. You must have given them some over-all program.

"A. Well, the only thing I told them not to touch were the Air Force projects, which were current more or less, and they had their share of engineering."

A. That is correct. I told them to use their judgment in transferring the costs.

(464) Q. But some of those jobs that you took time out of, so to speak—some were closed and some were open; is that right?

A. I believe so.

Q. Now, when preparing the termination contract or termination proposal, did you tell Mr. Spiegel, and I quote again: "Do you recall telling the F. B. I. that you did not examine the terminated contract, the instant contract, prior to the preparation of the settlement proposal to determine whether it was a supply or a development contract?"

And your answer: "That is right. The only thing I did get was the termination article."

Is that right?

A. That is correct.

Q. So that when you prepared the termination proposals at that time you didn't know whether you were preparing to terminate a supply or a development contract; is that correct?

A. No; I felt that in view of the hardship hearing—I felt that this was a project of engineering and redesign.

Q. Now, in these contracts that you took time out of, that in effect reduced those contracts, did it not?

A. That is correct.

Q. And actually there wasn't any particular rhyme or (465) reason to reduce these contracts, was there?

A. Well, yes; the charges had to be in those contracts, in the forty-seven contracts.

Q. I understand that, but in taking certain time out of those forty-seven contracts you did not analyze those contracts at all, did you?

A. Only on an over-all basis.

Q. Did you go over them; each one of the forty-seven of them?

A. No, the individuals went over the cards on the forty-seven projects.

Q. Well, didn't you tell Mr. Spiegel this: "Well, it was just an arbitrary lifting of costs from other contracts, then, and transferring them to this contract.

"A. That is right.

"Q. So there was no justification for reducing any one of these contracts by the amount you reduced it?

"A. That could be so."

A. Yes.

Q. You so told Mr. Spiegel?

A. Yes.

Q. "Q. My point is this, Mr. Mastros, that there was no justification at all for reducing the costs incurred (466) on these forty-seven other contracts which you reduced.

"A. Well, the engineering would have had to come out of some place.

"Q. That is true, but there was no justification for taking it out of these other contracts, was there?

"A. No, except it lowered the average over all these contracts.

"Q. Well, it also supplied you with some $87,000 worth of costs for 381E.

"A. $77.000 worth of costs.

"Q. Which could not have been obtained anywhere else?

"A. That is right."

Is that correct as you told it?

A. Well, I assume so. I assume that is right.

Q. I don't want to mislead you. If you have any doubt I want to bring it over and show it to you. Do you?

A. I might have said it; yes.

Q. Now, this morning I recall—at least I think I recall—you saying that it would not have been any easier to do it by way of journal entries. Am I correct that you so stated?

(467) A. That is right.

Q. Did you tell Mr. Spiegel this:

"Q. Well, generally good accounting procedure, as I think they phrase the term, or generally accepted accounting procedure.

"A. Good accounting procedure was—I should have used journal entries but I am not defending the company for having poor records * * *."

A. That is correct.

Q. Did you tell Mr. Spiegel that?

A. That is correct.

Q. Well, you did tell Mr. Spiegel, "I should have used journal entries," did you not?

A. In a better accounting procedure, yes.

Q. Well now, did you also tell Mr. Spiegel that you had never seen a rewrite of a whole job as here?

A. I don't recall.

MR. KOSSMAN: Read it all. I stipulate that you are reading correctly.

BY MR. FOGWELL:

Q. "I am talking about a rewrite of a whole job, which was done here.

"A. I have not seen it."

A. Correct.

(468) Q. You and Mr. Kossman have me in a box. You want to see it and he doesn't want me to show it to you.

A. I don't know whether he used that word "rewrite".

Q. As I read the stenographic notes, Mr. Spiegel says: "I am talking about a rewrite of the whole job, which was done here.

"A. I have not seen it.

"Q. You have never seen it, have you?

"A. No."

A. Well, that is true. I have not seen it in any of my other positions.

BY MR. FOGWELL:

Q. "BY MR. SPIEGEL:

"Q. Did you ever disclose to the Air Force auditors the fact that you had rewritten the records or corrected the records?

"A. No, I didn't disclose that because I felt that the records were now in proper order."

Did you tell him that?

A. That is correct.

Q. You corrected these records in March of 1953, did you not, substantially?

A. Substantially, yes.

Q. And you had the auditors in there—you had a number (469) of them—in March of 1953 when you did this modification job? You had Mr. Weiss in there in April, you had Mr. Hollis in there in June?

A. Mr. Weiss I told—I believe I told him that anyway. Mr. Weiss was informed that there had to be corrections to this 381 project, that there was about $70,000 or $75,000 missing.

Q. Well, you did tell Mr. Spiegel that you hadn't disclosed it to any of the Air Force auditors, did you?

A. Well, then I couldn't remember everything.

Q. I am not questioning that, and I don't mean to be impertinent or nail you down, but you did tell Mr. Spiegel that you did not tell any of the Air Force auditors that you had rewritten the books?

A. If it is there I told him that, yes.

Q. Notwithstanding that, you rewrote the books on this job practically in toto in March of 1953. In March of 1953 you had Mr. Weiss; again in April; Mr. Hollis in June. In June you submitted the second proposal. In July you submitted the third proposal. In September and October you had Mr. Grossman there for a couple of weeks. Then you had Mr. Goldenberg. Then you went to visit Mr. Goldenberg. Then you had a conference with Mr. Pinsley. And at no time in there did you ever tell the Air Force (470) auditors, the auditors of the person to whom you were sending this bill, Uncle Sam, that you had rewritten the whole job labor; isn't that correct?

A. No, I didn't tell them that I had rewritten the job labor.

Q. Did you tell Mr. Spiegel that at Hazeltine all adjustments were made by journal entry?

A. Yes.

Q. And you also told Mr. Spiegel that you knew of no labor transferred from one contract to another at Hazeltine; am I correct?

A. That is correct.

Q. Now, as a matter of fact on these time cards the job number is here along the left, is it not?

A. Correct.

Q. It is in this one. You can probably see it that far. The job number is along the lefthand side, the vertical column here, is it not?

A. That is right.

Q. And this reads 437, 461, 381, 383, and so forth. Now, my question is, when you changed them, for instance this 461 to 381, did you erase the whole thing to write in there 381, or did you merely draw a line through it and write 381?

A. I don't know.

(471) Q. You don't know?

A. No. I don't know.

Q. Well, if I told you that you told Mr. Spiegel two years ago that you used the erasure method, would you agree that you then knew?

A. I really don't know. The cost accountants may have erased—they did tell me later that they did erase—but in my opinion they were crossing out—using both methods—either erasing or crossing out.

Q. One or the other or both?

A. Or both.

Q. What did you mean when you told Mr. Spiegel:

"Q. Now, you made these transfers on the books during the period August, 1950, to May, 1952?

"A. Yes."

How does that tie in, if at all, with what you are telling us now, that the bulk of this time card changing was in March of 1953?

A. We used the period of May—of August, 1950 ——

Q. Oh, I beg your pardon; this is the period ——

A. Covered.

Q. —that you used—not when it was physically done.

A. That is the period in which the engineering was supposed to have been done.

(472) Q. Now, do you know when the model was submitted on these things?

A. The model was submitted in May, 1952. We had an invoice in the office showing the date that the model was delivered.

Q. Now, your company did not produce the manual on this job, did they?

A. I think they were supposed to produce a manual and also spare parts lists which usually went along with the engineering.

Q. Well, I am not questioning that. My question to you now is, and again I don't want to be arbitrary. But my question was, your company did not produce a manual, did it?

A. I am not sure.

Q. You don't know. Well now, when you took $77,000 away from some of these forty-seven other contracts, a quantity of it, namely $16,000 of it, was taken out of the heading called "Publications", was it not? Again, if your recollection is bad, you did so tell Mr. Spiegel?

A. Well, I didn't tell him—no.

Q. Well, I will read it to you if I may:

"Q. In looking over your papers some $16,000 for publication labor was transferred from other (473) contracts to 381E. Were you aware of that?

"A. $16,000 was transferred from other contracts to 381E? Will you repeat the question? I didn't get it.

"Q. Were you aware of that?

"A. $16,000 of what, publications, did you say? No, I wasn't aware of that.

"Q. How did that happen?

"A. Well, I imagine how it happened was that the clerks went through the time cards and transferred some of the publication department's time onto this job.

"Q. In fact, that was what was done; yes?

"A. Right. Well, that is how it could have happened, but you don't necessarily have to come up with a finished manual for the publication department to get into the engineering phase.

"Q. That is true enough, but isn't $16,000 a sizable figure if you didn't put out any manual?

"A. I couldn't judge that at this point."

That is what you did tell him, "at this point."

"I think on the size contract that this is, $16,000 wouldn't be too high.

"Q. You say that would come from being incorporated (474) in the general over-all figure, or it would be carried separately?

"A. That would be incorporated into the overall figure.

"Q. Wouldn't there be a breakdown of that?"

And you say "No," or words to that effect.

A. That is right.

Q. My question to you now is, if your company did not produce the manual, how could you have justified taking $16,000 away from publication labor and putting it into this contract?

A. Well, as I stated before, the publications group are the group of technicians that worked along with the engineering, and they could have expended approximately that amount of money.

Q. Well, did you tell Mr. Spiegel: "You didn't care where it came from, then.

"A. We didn't give it our attention?"

A. No, I didn't give it my attention, no.

Q. Well, I read your answer again: "We didn't give it our attention."

A. Well, I meant "my attention". The cost clerks were to use their own judgment, since they initially prepared the cards.

(475) Q. Now, you told us this morning something about your applying for a job elsewhere. Did you tell Mr. Spiegel:

"Q. Were you satisfied with your job at Espey in 1953, spring, summer?

"A. I was satisfied with the salary. Of course, when I first came there they started me off with $200, which was not what I asked for, but they adjusted that in the second month. But I was never happy there because I also found out that they had intended to move to Saratoga, and if I had known this I would not have taken the job because I have no intention of moving to Saratoga Springs."

A. That is right.

Q. Well, you were satisfied with the $15,000 they were paying you, weren't you?

A. I was. I was not satisfied with the cooperation I got.

Q. Did you tell Mr. Spiegel this: "At the head of this group there was probably a chief engineer.

"A. At the head of the group was a chief engineer; right.

"Q. And was it called to his attention that his time was low on this particular project.

"A. By me?

(476) "Q. Yes.

"A. No. I had never called it to his attention."

You did tell Mr. Spiegel that, didn't you?

A. Who was this, the project engineer?

Q. Well, I read it as the chief engineer.

A. Yes, that is right. That is right.

Q. So, that in effect your whole thought on this when you transferred the $77,000 was that you were just correcting a sizable error; is that right?

A. Yes, sir.

Q. It was a whopping big error, wasn't it?

A. It was a sizable error, yes.

Q. You were interviewed by the F.B.I., by Mr. Miller here, as a matter of fact, late in 1953, were you not?

A. I don't know the exact dates—yes.

THE COURT: I don't know that extensive cross-examination there is necessary. He said that everything Mr. Miller said was substantially true.

BY MR. FOGWELL:

Q. You were indicted in this case by the grand jury in May, 1955, were you not?

A. I received the indictment in June of 1955.

Q. When you talked to Mr. Miller you were to a degree, (477) as I understand it—I don't know just how much or how little—dealing with the company counsel, were you not?

A. Dealing with company counsel?

Q. Yes, in a way. You did not have counsel of your own, did you?

A. No; the others were always around them.

Q. You have or had counsel in New York named Mr. Sylvester, did you not.

A. Yes.

Q. When did you first discuss this with Mr. Sylvester?

MR. KOSSMAN: I object.

THE COURT: Objection sustained.

MR. KOSSMAN: I object to a conference with counsel.

THE COURT: Is that all.

BY MR. FOGWELL:

Q. Would Your Honor indulge us just a moment, sir? I think that is all.

MR. KOSSMAN: May I see the grand jury notes?

(Handed to Mr. Kossman by Mr. Fogwell.)

RE-DIRECT EXAMINATION.

BY MR. KOSSMAN:

Q. I just want to ask you a few questions. Why were there only two models produced?

(478) A. Well, the contract was terminated as they went into production. It was the end of the war. And there were also some statements made that the Signal Corps had ordered ten of these units per tank instead of one. They overbought, so the contract was terminated. They never produced it.

Q. Was there any other reason for the termination of the contract?

MR. FOGWELL: I don't see how he could know that.

THE WITNESS: No other reason that I could see. The termination was for the convenience of the Government.

BY MR. KOSSMAN:

Q. No. 2, did you attempt to get the tax reports of this company from the accountant, as the controller, so you could check up what taxes they were paying?

A. Yes, I made several attempts. As a matter of fact, there was quite a dispute.

THE COURT: What pertinency has that to this question?

THE WITNESS: I never got the ——

THE COURT: I won't hear this. This has no pertinency.

MR. KOSSMAN: Exeept it shows the attempt of the company to conceal from their own controller.

(479) THE COURT: We are not concerned with that in the slightest. Objection sustained.

BY MR. KOSSMAN:

Q. No. 3, in January of 1954 there was a $10 million contract given by the Air Force to this company; is that right? Or you were settling at that time a $10 million —— .

A. Yes, they were settling at that time.

Q. Settling at that time.

A. That is right.

Q. In determining the engineering charges to that particular contract did you use the same identical method that you did in the one before, and upon inspection by the Government auditors was the engineering cost upheld?

A. For the competion of the job we used an estimate, yes, and ——

Q. Based on ——

A. Based on the past experience of that contract.

Q. You mean percentagewise?

A. That is right.

Q. And you made the estimate?

A. Right.

Q. And what happened?

A. Well, this went to negotiation, and without references to any particular cost it was negotiated and approved. There (480) was very little difference between what the company asked and what the Air Force had granted.

Q. Finally, when you appeared before the grand jury, the first question Mr. Spiegel asked you was, "What is your name?"

Then he said, "Where do you live? How old are you? What was your formal education?" And so on and so forth. And you testified, I see here—there are 196 pages, and an adjournment—I don't know—does this represent the entire testimony?

MR. FOGWELL: To the best of my knowledge it does. I wasn't there.

BY MR. KOSSMAN:

Q. (Continued.) April 27 and 28, 1954. Were you told by Mr. Spiegel that you were the subject, the object, and that he would present an indictment to the grand jury against you?

A. Well, he didn't say he would present an indictment. I don't know whether he said anything else.

MR. KOSSMAN: That is all.

RE-CROSS EXAMINATION.

BY MR. FOGWELL:

Q. You were aware, were you not, that anything you said might be used against you?

(481) MR. KOSSMAN: I don't see it in the grand jury notes.

THE WITNESS: I don't recall. Honestly, I don't recall.

MR. FOGWELL: Page 21: Question by Mr. Spiegel—"Mr. Mastros, before we proceed any further I would like to advise you of your Constitutional right to refuse to answer any question which either the members of the grand jury or I may propound which you believe might tend to incriminate you. You understand what I mean by that?

"A. I believe I do."

That is all.

* * * (N. T. p. 481.)

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(482) GOVERNMENT'S EVIDENCE IN REBUTTAL.

BERTRAND J. TIFFANY, having been duly sworn, was examined and testified as follows:

Testimony (pp. 482-490 inc.) *Omitted.*

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(490) PAUL T. LEIBOVITZ, having been duly sworn, was examined and testified as follows:

Testimony (pp. 490-503 inc.) *Omitted.*

(503) CARL S. GROSSMAN, recalled.

DIRECT EXAMINATION.

Testimony (pp. 503-507 inc.) *Omitted.*

(507) MR. KOSSMAN: The defendant renews his motion for judgment of acquittal at the end of the Government's case, and asks the Court either to decide it in his favor (508) at this time or to reserve decision pending deliberations of the jury.

THE COURT: What are your reasons?

MR. KOSSMAN: On the whole of the case it is so evident that there is no false statement made by the defendant wilfully, knowingly, and maliciously. There may have been, conceding, a wrong statement, but if the F.B.I. agent does not know what the engineering time actually spent was, and no one has actually said that it was only a dollar's worth of time spent, then how can the jury be asked to say whether it was a false statement submitted. Now, comparisons with the company that has $12,000 are certainly unimportant, because we don't know whether it was a larger contract or a smaller contract; so in the final analysis this case is going to the jury on the question of whether the defendant wilfully and knowingly, with a bad purpose, filed a false claim and made false representations.

THE COURT: No, I think your approach to this, or else mine, is entirely wrong. I don't see any factual question, because this defendant has said that substantially what the F.B.I. agent said was correct. By his own admission, he has submitted a wrong claim. He has said that he submitted a claim which he ordered the erasures (509) on, involving forty-seven jobs that had no relationship what-

soever; the work he put in that claim was not done on this job; it was taken from forty-seven other jobs and put in there. Now, that in and of itself comes within the statute of submitting a false and fraudulent claim if the jury, laying it in the context of the whole, say that he did it wilfully and with intent to present a false claim. All this other thing that the Government has allowed to go in—I have long since reconciled myself to that attitude—if they saw fit to have it go in, it just went in—I think is all irrelevant. I think it is immaterial. And you went ahead without any objection being entered. But on that fact alone, on his own admission, there is no question left here except his mental state—none at all.

MR. KOSSMAN: If the Court please, I have probably not made it as clear to the Court as I have it in my mind. There was no admission to the F.B.I. agent at any time that there was a false claim made.

THE COURT: Now, wait a minute. I am so sated with this. It is so obvious that I don't think it can even bear repetition by me. Here is a man who went out, went to forty-seven jobs, took them right out of the air and put them in a claim which he represented to the Government was the proper engineering cost of this contract.

(510) MR. KOSSMAN: That is right.

THE COURT: He went out and he did it, and I say that the jury can say that that was a fraudulent claim, because he has not here in his own defense stated what ground he had. He lulled the Government into a sense of security by submitting that claim, that that work was done on that job. Why the Government did not hew to that line, I don't know, but that is in the record, and that is sufficient to take this case to the jury.

MR. KOSSMAN: If the Court please ——

THE COURT: There is no question about that. I have yet to see a clearer case, on an admission by the man himself who says that it is substantially true. We have wasted a couple of days, in my judgment.

MR. KOSSMAN: If the Court please, we gave the basis ——

THE COURT: I am not going to argue whether he is guilty or innocent. I won't do that. You can argue that. I am just saying that the man on his own admission said, "I went out and took forty-seven jobs that had no bearing on this at all and I put it in this claim 381."

MR. KOSSMAN: Because time was actually spent here.

(511) THE COURT: I don't care what time was spent. There may have been more time spent. We are not asking the reasonableness of the 2 or 3 per cent. It may have been reasonable or fair, but he had no right, and the jury can so find that he did not have the right, to take work on forty-seven other jobs and put it in here and lead the Government to assume that that work was performed on this job.

MR. KOSSMAN: He is not charged with that. He is charged with submitting a false claim. If there is no false claim in fact, there is no false claim.

That is Point No. 1.

THE COURT: That, he has admitted. He takes himself out of the realm of possibility; it is what he did.

MR. KOSSMAN: No. 2, I would like the Court to know under the open case that even statements of that nature, after the particular crime has been committed, have to be corroborated by the corpus delicti, and it is missing here.

My next point is the venue question.

My third point is that under the doctrine, I would say, suggested by U. S. v. Scully, in Frank's opinion.

THE COURT: That is a dissenting opinion.

(512) MR. KOSSMAN: It is not a dissenting opinion; it is a concurring opinion, with all due respect to Your Honor, but he points out the difference between that type of case and this type of case. In that case it was not brought out as here: Here, he simply said, "The question may incriminate you." That is not the same as saying to an individual that you are the subject and object of an indictment, which took place here.

THE COURT: What does all that lead up to?

MR. KOSSMAN: That leads up to the fact that the indictment should be dismissed on the grounds that the defendant was placed in the position of giving evidence against himself before a grand jury without having been told that he was going to be indicted.

THE COURT: There is no such necessity in the law. I want you to show me one case.

MR. FOGWELL: The Burdick case says to the contrary.

THE COURT: So does the Ryerson case.

MR. FOGWELL: In connection with something which concerns Judge Welsh, Mrs. Rian is pressing me for an answer. I don't like to interrupt Your Honor, but it is to suit Judge Welsh's convenience and not mine.

(There was a brief interruption.)

(513) MR. KOSSMAN: We also have the venue problem.

Now, I have made my motion, and I believe if the Court would look at the F.B.I. statement it would see that it is quite the contrary; the F.B.I. fellow himself didn't know whether the work was done. We, as a matter of fact, believe that the work was actually done. He simply said he used that as a basis because the previous history of the company had been that that was how they did it. He is not charged with any other particular contracts. In this particular contract is there a false claim or not? There is only a false claim if there was no engineering work.

THE COURT: No, that is not so. The false claim is what he states in that claim which he presents.

MR. KOSSMAN: That is right. Is there any evidence here that the claim was false?

THE COURT: Yes, there is. There is certainly plenty of evidence. He went out and took from forty-seven jobs labor costs that had no bearing on this job at all.

MR. KOSSMAN: Was the engineering work done?

THE COURT: I am not concerned with whether it was done or not. I would not have heard it, but the Government let it all go in to the degree that it obscured (514) the case.

MR. KOSSMAN: Would the Court care to reserve ——

THE COURT: Yes, I will reserve judgment on it. Surely. You may argue it again.

MR. KOSSMAN: On the defendant's request for charge, I have given the Court at ten o'clock this morning a copy, and I have given the district attorney a copy.

THE COURT: I think they are all essentially all right.

MR. KOSSMAN: Will the Court charge today?

THE COURT: No, but I want the Government to go on with its first speech.

(Discussion off record.)

THE COURT: Bring the jury in, Mr. Reynolds, please.

MR. FOGWELL: One last thought. I did not submit any written points. I know Your Honor covers me like a dollar bill covers a dime on this, but I would like to ask Your Honor to put something in the charge about the fact that the jury may or must consider interest or bias of a witness. You probably would have anyhow.

MR. KOSSMAN: If the Court please, would the Court really care to re-examination his position and look (515) at the actual statement, because it states there specifically that he said he did what he did because he believed then that the existing books were incorrect and he instructed the above three individuals to correct the weekly time cards, payrolls, and summary sheets.

THE COURT: Oh, surely. Certainly, he did it, and he can't deny he did it. He says he thought it was correct.

The F.B.I. agent in his testimony went into quite some detail. He gave instructions to three people to change it, to erase it.

MR. KOSSMAN: To correct it.

THE COURT: That is all deliberate, considered judgment; it is not emotional judgment. It was long considered. It took months or weeks to do it.

MR. KOSSMAN: He gave his reasons why.

THE COURT: The jury have every right from that fact to infer wilfulness, intent to defraud and everything else.

MR. KOSSMAN: Is it your position that there is only one inference the jury can draw from the facts in this case?

THE COURT: No, I would not say that at all, but I do say the only question involved here is one of (516) intent, because the defendant himself has admitted it, and he admitted it before the grand jury. He cannot deny it. It is in the record.

MR. KOSSMAN: He never did.

THE COURT: There it is. He admitted he changed it. It was not the correct time on this job. And he did it on the basis, he said, of 2 to 3 per cent.

MR. KOSSMAN: Well, our position is, so there can never be any doubt about it, that there was no false claim submitted to the Government wilfully and knowingly; that what he did, he did because of the prior history of the company's records, the lack of cooperation, the inability to have any definite other basis in order to establish engineering costs.

THE COURT: All right, you can argue that.
Bring in the jury.

MR. KOSSMAN: I assume the Court will not charge on the evidence; is that correct?

MR. FOGWELL: I don't know why you would assume that. I think that is the judge's prerogative.

MR. KOSSMAN: Well ——

(The jury returned to the courtroom at 3:56 p. m.)

THE COURT: All right, Mr. Fogwell.

(517) (Mr. Fogwell argued the Government's case to the jury.)

MR. KOSSMAN: I inadvertently, if the Court please, forgot to move that defendant's exhibits be admitted in evidence, and I ask that the case be reopened in order to permit that admission.

THE COURT: They will be admitted.

Your point will be dismissed which you put in writing. It is denied.

You are excused, ladies and gentlemen, until tomorrow morning at ten o'clock. Do not discuss this case with anyone nor permit anyone to discuss it with you. Be in your seats at ten o'clock.

I want to see counsel for a minute.

(Jury out at 4:58 p. m.)

THE COURT: I think I am going to dismiss Count 2 here, although the defense has not asked for it, on two grounds. I think it involves where a false and fictitious claim is allegedly presented—the scheme of it, I don't think, as I read the cases it should be—it has been also held that the false scheme, the fraudulent makeup or trick, is the same as the presentation of the false scheme but, again, if it was done, it was done in New York. All of the acts testified to here were done in (518) New York; they weren't done here.

MR. FOGWELL: Would Your Honor—I really don't

know—would you give me a chance to read a little law on it overnight and not make up your mind till morning.

THE COURT: You say here in the second count that it was submitted to the Department of the Army for approval, payment and settlement. That is not in 1001. 1001 does not require submission or approval; it just says, "Whoever, in any matter within the jurisdiction"—well, we will hold it over until tomorrow morning. I will look at it. We don't want to have any dispute about it.

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(520) CHARGE OF THE COURT.

GANEY, J.

Ladies and gentlemen, the case you have been listening to so patiently for five days originally contained two counts in the bill of indictment. The Court has withdrawn the second count against this defendant and you will consider only the first count.

This first count is drawn under an Act of Congress which provides as follows:

> "Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined * * *" and so on.

The first count of this bill of indictment drawn under this Act of Congress avers or alleges that on or about July 31, 1953, in the Eastern District of Pennsylvania, and within the jurisdiction of this Court, George Mastros, hereinafter referred to as defendant, did make and present, or cause to be made and presented, for payment and approval to the

Department of the Army, an (521) agency or department of the United States, a claim against the United States for radio-telephone electronic units on behalf of Espey Manufacturing Company, Inc., in the sum of $1,128,875.81, knowing such claim to be false, fictitious and fraudulent in that the aforesaid defendant made and presented or caused to be made and presented to the Department of the Army, a settlement proposal dated July 31, 1953, on behalf of Espey Manufacturing Company, Inc., which settlement proposal stated $1,128,875.81 was due and owing to the Espey Manufacturing Company, Inc., for radio-telephone electronic units, which claim was false since said defendant well knew that the total amount due and owing to the Espey Manufacturing Company, Inc., on said settlement claim was substantially less than the amount claimed; all of which is in violation of the Act of Congress which I have read to you. In reading it I mentioned a fine. That is not all of the penalty, but you have nothing to do with the penalty; that lies within my province; but this indictment was laid under and in connection with that Act of Congress which I have read to you.

I say, with no resort to flattery, that you have listened patiently for five days to this case, and it has been a long and involved one. As it progressed, I thought it was a very intricate accounting problem and I (522) was very anxious that you be able to see all facets of it, because accounting is not a study or a status with which the average layman has easy familiarity. I do not. I took accounting in college, but my accounting was never one of the things that I was very proud of. Some minds do not have a mathematical tendency. It was on that score that I thought we ought to go in rather great detail into questions which were originally propounded to the various witnesses, but as the testimony went on it seemed to me that whatever complexity had at first shrouded this case had been dispelled. The difficulty you will have, if any, is in trying to assay and to evaluate a person's mind.

I shall not trespass your province, the factual province which has been so long associated solely with the jury that its origin is lost in the antiquity of hundreds of years. You will have to resolve the facts; you will have to pass upon them; you will have to evaluate them, and make your determination of the things which I shall advert to, however, it seems to me that your problem concerns itself only with one situation really. A number of you have sat on other juries, and what I say to you may seem trite, but it is requisite that you have firmly fixed in your minds (523) the standards and the criteria by which you judge this evidence, by which you make your decision as to the guilt or innocence of this defendant.

I would like to say that I do not think jurors ever perform a higher civic function than that of sitting in judgment upon a fellowman. I think throughout life one is called upon to perform a lot of services, civic and otherwise, but when one sits in judgment on his fellowman he should exercise and draw upon his best talents in order to arrive at an intelligent and just judgment.

First, before you can pass on the evidence, which I shall not review but to which I shall advert with regard to some of the highlights, it is requisite that you know the framework within which you are to make this judgment, because unless we bind it in, unless we curtail the field, it may well be that you would resort to certain judgments which the evidence would not warrant. Irrespective of the parties involved, I am going to ask you to look at this objectively as twelve reasonable men and women, and to reach a conclusion in conformity with the law as I give it to you; and you will regard the court's statement of the law as the best evidence of what the law is.

This defendant comes into court, as you have heard many times, clothed with the presumption of innocence. That is a presumption that is inherent in the Anglo-Saxon (524) system of law. It has been for hundreds of years. It is unlike the Continental system where the defendant is pre-

sumed to be guilty; here the defendant comes into court clothed with the mantle of innocence, and that mantle stays wrapped around him until the close of his trial.

In order to overcome that presumption the Government has certain burdens which it must meet. It must prove this defendant to be guilty beyond a reasonable doubt.

Reasonable doubt has been defined to you many times. It is such a doubt that would cause you to pause and to hesitate in matters of the highest importance in your own private affairs. It is not some loose or easy thing which you might conjure up in order to rid yourself of what you might regard as an unpleasant task that is imposed upon you in disposing of this case. It is something which must arise solely from the evidence which you have heard from the witnesses on the stand.

As both counsel have told you, this indictment is not evidence; it is merely a charge. You may have it with you, if you wish, when you go out to deliberate, but you are to give no credence to it at all. It merely states the charge. It is up to the Government to prove the content of the charge—to prove beyond a reasonable doubt that this defendant is guilty.

(525) Weaving in and out of this case over the days which you have sat and listened to it are things which, it seems to me, should not demand your attention as the central or focal point of your inquiry. This indictment charges this defendant George Mastros with presenting a false and a fraudulent claim on behalf of the Espey Manufacturing Company to an agency or a department of the United States, to wit, the Department of the Army, knowing the claim to be false and fictitious. Now, the indictment alleges to you, and you must keep it in mind, that he did make and present or cause to be presented a claim, knowing said claim to be false, fictitious and fraudulent. That seems to me to be the nub or the essence of this case.

Something has been said with respect to interest. You should look at the witnesses as they take the stand, and

you should determine whether they have an interest. The defendant has an interest, certainly. But if you find any person has an interest, merely because he has an interest is no reason to disbelieve him; or, more particularly, to cast any doubt upon him, just because the person is a defendant. On the Government's side of the case if you feel that someone has done something or said something which you do not feel jibes with your criterion of justice and fairness, unless it affects a material part (526) of his testimony, I wouldn't want you to draw any unfair inference from it, unless you are convinced that his attitude or the content of what he says hasn't the ring of sincerity, hasn't the truthfulness which you would require of one in his particular status.

I shall merely highlight what I think is the Government's case, and what I think is the defendant's case. I shall not attempt to review the evidence, nor have I any judgment with respect to it. The fact that I do advert to some of it and do not advert to the whole of it does not mean that I have any particular feeling that the evidence I advert to should be weighed with any greater care than any other part of it. It is all important; it is testimony which you will weigh in accordance with your own standards, and of which you will determine the truthfulness.

The factual side of this case does not seem to me to be particularly complex. As I indicated to you, in the beginning I thought it was, but as the case progressed, and finally when Mr. Miller, who was in charge of this investigation for the Federal Bureau of Investigation, told you that in a statement orally this defendant admitted to almost exactly what the Government charged, absent the requisite intent to defraud and to falsify, it seemed less complex.

(527) We do not have to resort to a lot of accounting practice here to determine whether facts and figures jibe, whether they meet with the contention of the Government. The Government has a case on its factual side with reference to the presentation of the claim per se, where the

defendant himself says, "I did." And, briefly, the Government says to you that this defendant presented this claim of $1,128,000. The figures don't mean much. It is nearly a million and a quarter, and of that claim, the Government charges that some $80,000 was false and fraudulent, and that he knew it, and that he intended to present it and they tell you how originally up through December, 1951, there was a claim for engineering costs which totaled $919; later on, I think, a hardship claim which you will remember was presented to the Pentagon having been increased to something like $2314 through 1952. That included the $919 which were the engineering costs up through December 31, 1951. When the termination proposal was coming along, when they were working up their final cost to the Government, it abandoned the contract, and there is no assertion that they had no right to abandon their contract—there was a provision for it in the original contract—this defendant said he thought in his judgment that these costs were too low, and the (528) Government says and he says himself, he went out and took labor from forty-seven other jobs that had no relationship, no bearing, on the job on which this claim was presented. On forty-seven other labor jobs he erased the number of those contracts to which labor engineering cost was charged and had inserted "381" and that made up the bulk of some $80,000 of engineering costs which were not performed on this contract. The Government says, when he did that he presented to the Government of the United States, the Department of the Army, a false and fraudulent claim. I shall not attempt to divine what Congress had in mind when they passed this statute, but suffice it to say that it looks on its face to be a statute which requires people who deal with the Government or with whom the Government deals, to do so at arm's length, so that the Government may rely upon the sincerity and truthfulness of the claim which is presented; that it shall not be necessary every time a claim is presented to the Army or Navy, or now the new Air Force Department, for

them to go back and analyze each claim. That would be a Herculean job; it would be impossible of performance. So they require when people present a claim to the Government that it be an honest claim and that it represent in truth and in fact the amount of labor or the amount of work done in connection with it, or whatever (529) the contract itself calls for.

I do not want to embroider it or to balloon it up, but briefly the Government says to you, laying the presentation of this claim by this defendant in the context of every circumstance that surrounded it, the Government has made out a case which you should believe beyond a reasonable doubt, that this defendant did present a false claim, that he admitted he presented a false claim, that he did it intentionally, and that he did it with the idea of defrauding the Government of the United States, more particularly the Army, out of some $80,000, and that the costs that he included in this job were just pulled out of thin air and included here, and to that extent it was false.

The defendant takes the stand, and he says, "Yes, I did do this. Yes, I did." And to me it is a novel case. It requires, it seems to me, a bit of psychological examination, a bit of psychiatry, to determine whether or not this defendant did this with the intent to defraud the Government, whether he was conscious that it was a false and fictitious claim, and if he did it, whether he did it with the intent to defraud the Government. While I do not want to trespass your province, it seems to me the central point of your inquiry should be whether or not this was done falsely, fraudulently, and with intent to defraud (530) the Government of the United States.

Of course, he has said that what the F.B.I. agent, Mr. Miller, said was substantially true. That is a factor we do not often encounter in these courts. He relied solely, as I see it, on the fact that he did not do it wilfully or with intent to defraud the Government. To resolve that requires you to lay it in the context of the entire matter. You will

have to go to the periphery and examine it and determine what were the factors in his mind.

Did he do this intentionally? The defense argues to you that he did not; that, in the first place, there was nothing surreptitious about it; the cards he had were strewn around; it was not done in the nighttime; it was not done with the idea of concealment or of trickery: It was done openly, that he had some basis for doing it, doing this wrongful act, because he thought in his considered professional judgment these engineering costs which had been included in the original hardship claim, and which he was not responsible for, were ridiculously low; and that he was trying to benefit his employer and give him the benefit of what he thought was his due under this contract. He made an estimate of some 3 per cent, and he sent these clerks out to do this, and to get this labor from other jobs that bore no relationship to what was (531) being done under the specific Job 381, and inserted them in this claim.

He says he labeled it "381-E", and I shall not go into the many other factors; for instance, defense counsel lays great stress on his attitude later, that he made no attempt at concealment from the very beginning; that he went before the Grand Jury, waived his immunity, and before the Grand Jury said, "I did that"; he talked to the F.B.I. and said, "I did this." He takes the stand under oath and says, "I did it," and relies, it seems to me, solely on whether he did it with intent to defraud and with the idea of cheating the Government of the United States.

Now, fraudulent intent is something of an abstraction. We cannot prove it directly. We have to infer it from all the surrounding circumstances. You cannot prove directly a state of mind as such; you gather the individual state of mind from the operation of the act from all the surrounding circumstances—the nature of the claim, his conduct in its operation, in its preparation, in the very nature of the act which he commits, and you have to determine, to use a psychological term, the ratiocination of his mind; you have

to determine what operated within his mind—did he want to defraud the Government, from anything you heard him say, even though (532) he did a wrongful act?

There were a lot of other things here that have some bearing on it. I don't think they illumine the picture a great deal, if at all. I am not concerned with, and I cannot castigate, the Pinsleys or Pinskys, with the enthusiasm the United States Attorney does. I like to withhold my judgment. I do not say that disparagingly of a very able lawyer, but I don't think it weighs in the balance one iota how guilty Pinsley is, whether Pinsley should have been indicted before this person—maybe he should have; maybe all of them should have; maybe they shouldn't. I would withhold judgment as an arbiter; I would never attempt to pass judgment until I heard both sides. But whether Pinsley or the others involved are guilty is a question which shouldn't weigh in your mind. One of them took the stand and asserted his right against self-incrimination, which he had every right to do. Defense counsel may argue to you, and it is just an area of argument, that if he had testified he might have thrown some light on this operation, he might have been able to help the defendant, and while it would not involve him here, his admission on the stand, under oath, could be used against him in the event the United States Government saw fit to proceed against them; but as to the actual guilt or (533) innocence of this defendant, if anything, it proceeds around the periphery of the focal point of our inquiry, and is not a factor that would determine in and of itself, just because he pled his right against self-incrimination, the quality of this particular claim.

They are all factors, however, and you must take into consideration the whole gamut of this testimony. It was long. It may seem that there was a good deal of it that was unnecessary; but there, again, the United States Attorney has a role which he must play, and he deems it to be in the best interest of this case that he present it to you.

Likewise, the defense counsel has a responsibility on his shoulders. They both gave to the limit of their competency, and it is high competency, their particular points of view with respect to the evidence.

Now, if you feel that the lack of intent and the intent are equally balanced, you must then say that the Government has not met its burden. You must come to your conclusion within the limits of what I have described to you as reasonable doubt. In that connection there is a good deal of what one would call circumstantial evidence here. There is no direct proof. It is very important that under the circumstances of the case you analyze and assay (534) and weigh this defendant's state of mind.

The defendant has submitted a point which I shall read to you, which, as I see it, is a correct statement of the law, and I am sure the United States Attorney will go along with me that it is the law: In order to justify a conviction of crime on circumstantial evidence, it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt—every reasonable hypothesis but that of guilt. Every reasonable hypothesis but that of guilt must necessarily be excluded from that which is directly proven. There are certain circumstances that can be proven directly, and it is requisite when you find that those facts have been proven, that there are certain factors around this which are determinative of the state of mind, and, as I say, it is necessary that from those directly proven circumstances there be excluded every reasonable hypothesis except that of guilt.

I do not want to stress the defendant's side of this case or the Government's side of this case. I have no judgment —or, I should say, I have a judgment, but it is my own, and I would not try to impress it on you nor give you the slightest hint, because what I think is of no consequence at all; it is for your judgment solely. (535) You play the last role in this drama. While I have a right to comment on the evidence, I never avail myself of that right. I feel that a

jury of twelve reasonable men and women with their combined judgment far exceed what talent I may have acquired over the years in determining guilt or innocence on factual matters.

I don't know that I can add anything. There is a long list of points which have been submitted to me. It is the duty of the Government to prove that the claim filed was, in fact, false and fictitious and fraudulent and not the duty of the defendant to prove that the claim filed and the representations made were, in fact, accurate. Well, that is true. I don't think there is much doubt about the factual side of this case. I don't think there is much to be said, because the defendant has admitted it. He has not only admitted what he did, what the Government alleges he did, by his statement to the F.B.I.; he waived immunity before the Grand Jury when he said it; he took the stand here and said the very same thing, and although I do not want to be repetitive, in addition he corroborated what Agent Miller had said.

I have defined "wilful" to you as used in a criminal statute. It means an act done with a bad purpose, an evil motive, an evil mind. An innocent mind, a mind clear (536) and fresh, without any ulterior motive, would not devise a scheme; it must come from an evil mind; it must be motivated by a bad purpose, and that is a rather complex psychological factor that you will have to evaluate.

Now, the defense has offered a character witness, I think the parish priest of this defendant. The testimony of a character witness is real, substantial testimony. It is not just something that is thrown into the case; it is substantive testimony, just the same as any of the testimony which the defendant offers, and in and of itself, the law has said, it may of its own weight, coupled with the testimony in the entire case, be sufficient to raise a reasonable doubt in your mind. That is why we hear so often in criminal cases—in many cases anyway—defendants call people who testify to their good character. In reality it is not character. Char-

acter is what you are; reputation is what people think you are. This witness, known as a character witness, says that the defendant enjoyed a good reputation—I don't know whether he said an excellent reputation, but anyway I won't quibble with words; he said that he had a fine reputation, and that is substantive evidence which you will consider with the rest of the case, but which in and of itself could raise a reasonable doubt in your mind.

(537) I need not say anything to you about bias or prejudice one way or the other. You are certainly reasonable men and women and in an important case like this you would not let any bias or prejudice inject itself into the decision of a case which is of the utmost importance to the Government as it is to the defendant. It is of the highest importance that we keep the well springs of claims made against the Government pure and undefiled. Certainly the Government must rely in every sense upon the integrity of claims presented to it. The Government argues to you that in the context of the whole situation the defendant was guilty of the crime charged. On the other hand, you have the testimony of the defendant, with all the elaboration that has been put to it, the various factors he said induced him to do what he did, and that he is not criminally guilty of presenting a false, fictitious, fraudulent claim on behalf of this corporation with the idea of intentionally defrauding the Government of the United States.

I give you this case with whatever exceptions counsel may take, and I ask you to give it your best judgment, not only in conformity with your oath, but your own good consciences.

MR. KOSSMAN: Would the Court read certain points for charge?

(538) THE COURT: Which ones do you want read? Do you want all of them read? Let me hear what you want.

MR. KOSSMAN: 1, 2, 3, 4, 5, 6, have been covered and are withdrawn.

Seven.

THE COURT: That has been covered.

MR. KOSSMAN: Eight.

THE COURT: Do you want eight read?

MR. KOSSMAN: Well, I will skip eight.

THE COURT: All right.

MR. KOSSMAN: I will save time. Thirteen.

THE COURT: I cannot read this word that is crossed out. What is it, "incorrect" or "innocent"? What is that? You have it crossed out and written in ink.

MR. KOSSMAN: "Even if it is incorrect."

THE COURT: Oh, "incorrect."

As it is worded, I am going to deny it, but I am going to say that if the claim was solely incorrect, that is not sufficient, as counsel makes out in his point to meet the standard which I have given you; it must be a wrongful purpose; it must proceed from a bad motive, a bad intent.

MR. KOSSMAN: The others are 14, 19 and 20; and (539) no other exceptions.

THE COURT: I will read fourteen. The fact that there were two contradictory statements submitted by the Espey Corporation as to the amount spent on engineering labor will not sustain the charges against the defendant. I think, relatively speaking, that that is right. I don't mean to

hedge on it, but I don't want you to lose sight of the forest for the trees. I want you to remember that that is a factor that you can consider in determining whether this presentation was a false and fraudulent claim with intent to defraud the United States.

What is the other? Nineteen?

MR. KOSSMAN: I will skip nineteen. It has been covered.

Twenty is the last one.

THE COURT: I will deny your Point 20 as stated.

Now, have you anything, Mr. Fogwell? Do you have anything other than this?

MR. FOGWELL: No, sir; that is all.

THE COURT: I presume you know your verdict must be unanimous. There must be no disagreement. There must be unity in your agreement. Your verdict must be either (540) guilty or innocent, and any other function beyond that is for the Court.

I suggest you go to lunch, then come back and resolve your task. You may do as you wish, but you are privileged to go to lunch and come back and then make a decision one way or the other.

MR. KOSSMAN: The Court itself has dismissed the second count?

THE COURT: The second count is dismissed.

Swear the bailiff.

(The bailiff was duly sworn and the jury received Exhibits G-1 to 23 inclusive and D-1 to 6 inclusive. Jury out at 12:03 p. m.)

Verdict
Motion for New Trial and Judgment of Acquittal

(Jury returned to courtroom at 4:49 p. m.)

THE CLERK (Roland Greenwood): Members of the jury, will you please rise.
Members of the jury have you agreed upon your verdict?

THE FOREMAN: We have.

THE CLERK: How say you with respect to Count 1? Do you find the defendant guilt or not guilty?

VERDICT.

THE FOREMAN: Guilty.

* * * (N. T. pp. 540-543 inc.) *Omitted.*

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(543) MR KOSSMAN: If the Court please, I wish to renew my motion for new trial and for judgment of acquittal.

THE COURT: Motion denied.

MR. KOSSMAN: I beg your pardon.

THE COURT: Well, you may file it.

MR. KOSSMAN: I have the regular time to file and additional reasons upon the printing of the transcript?

THE COURT: All right.
What about his bail?

MR. KOSSMAN: If the Court please, would you continue him under the same bail?

MR. FOGWELL: I am ashamed to say I didn't bring the file down.

THE COURT: Whatever the bail is, we will (544) renew it at the same figure, and you may file your reasons.

MR. KOSSMAN: I will file them, but I will order the transcript and file my motion. The record shows that he was acquitted on the second count.

THE COURT: That is right.

MR. KOSSMAN: Thank you very much.

THE COURT: Will you have him talk to the probation officer.

MR. KOSSMAN: Of course, his record is perfect.

THE COURT: I don't know anything about that, but I want to know all about him.

DEFENDANT'S REQUESTS FOR CHARGE.

1. The mere fact that an indictment has been returned against the defendant is not the slightest evidence that the defendant committed a crime.

2. Where the defendant's conviction is sought upon circumstantial evidence, the defendant is entitled to have his presumption of innocence sustained when the inference of innocence is a reasonable one under the circumstances.

3. If the jury finds that the Government has not proven its case free from a reasonable doubt, the verdict must be not guilty.

4. The presumption that the defendant is innocent remains throughout the entire trial.

5. Both knowledge and wilfulness must be established by independent proof, direct or circumstantial. There is no presumption that a claim or statements which are not correct are made wilfully with knowledge of their falseness.

6. In order to justify a conviction of crime on circumstantial evidence, it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt.

7. It is the duty of the Government to prove that the claim filed was, in fact, false and fictitious and fraudulent and not the duty of the defendant to prove that the claim filed and the representations made were, in fact, accurate.

8. The jury must not convict the defendant because of mere suspicions.

9. Evidence of good reputation is substantial evidence and may by itself, under the circumstances of this case, raise a reasonable doubt of the defendant's guilt, and if it does have such an effect, your verdict must be not guilty.

10. Where, after considering all the evidence, the jury believes that the evidence is as consistent with a non-wilful violation as with a wilful violation, the verdict must be not guilty.

11. Wilfulness implies bad faith and wrongdoing and must be proved by independent evidence, direct or circum-

stantial, and cannot be inferred from the mere filing of a claim which is not absolutely correct.

12. When the word "wilful" is used in a criminal statute it means an act done with a bad purpose and an evil motive.

13. A wrongful purpose is an essential element of the offense of making a false representation or a false claim and if the defendant did not have a wrongful purpose in making a claim or representation, even if it is erroneous, your verdict must be not guilty.

14. The fact that there were two contradictory statements submitted by the Espey Corporation as to the amount spent on engineering labor will not sustain the charges against the defendant.

15. The term "reasonable doubt" means a doubt of such quality as were to arise in your private lives in connection with some decision required to be made by you but would cause you to pause, hesitate and ponder in that decision. So, if, when all the facts and evidence in this case have been considered by you, you are not abidingly persuaded and convinced through a moral certainty in your own conscience that the defendant is guilty, you have a reasonable doubt and must acquit the defendant.

16. Mere probabilities or suspicions are not sufficient to warrant a conviction. You are not concerned with probabilities or suspicions, but only with evidence.

17. In this case, agents employed by the Government have testified on behalf of the Government. You are not to give any added weight to the testimony of such witnesses merely because they are Government employees.

18. You are to infer nothing adverse to the defendant from the fact that a grand jury has indicted him.

19. You must not allow any inferences or suspicions that the officials of the Espey Company may have defrauded the Government, to influence you against the defendant in the consideration of this case.

20. Even if the amount of engineering time, as submitted by the defendant on behalf of the corporation for this particular contract was incorrect, if, in the defendant's best judgment he believed it was correct, your verdict must be not guilty.

Respectfully submitted,

JACOB KOSSMAN.

RENEWAL OF MOTION FOR JUDGMENT OF ACQUITTAL AND IN ALTERNATIVE A MOTION FOR A NEW TRIAL.

The defendant moves the Court for a judgment of acquittal and in alternative a motion for a new trial for the following reasons:

1. The verdict is against the law.

2. The verdict is contrary to the weight of evidence.

3. The verdict is not supported by substantial evidence.

4. The Court erred in failing to charge the jury, as requested, as follows: "Even if the amount of engineering time, as submitted by the defendant on behalf of the corporation for this particular contract is incorrect, if, in the defendant's best judgment he believed it was correct, your verdict must be not guilty."

Renewal of Motion for Judgment of Acquittal and for a New Trial

5. The Court erred in not allowing defendant's witnesses to testify as to what, in their opinion, was the amount of engineering labor on this particular contract, but permitting the Government's witnesses to state their opinion as to what the amount of engineering labor might be on this particular contract.

6. There was no evidence produced at the trial that the claim was in fact false and that the defendant knew that the claim was false.

7. There was no proof of venue.

8. There was no proof justifying the trial of this defendant in the Eastern District of Pennsylvania.

9. The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

10. It is conclusively established by the Government witness, Louis L. Weiss, that the Government was told in April of 1953, and therefore knew before the settlement proposal was filed on July 31, 1953, that "there was about $75,000 worth of additional engineering labor which was expended which was not included in the figures" originally mentioned and that "it was a contractor's policy not to distribute labor for pre-production payroll until production was initiated, and it was not yet fully distributed at the time I was there," and "that there was a change being made increasing what had originally been on the books and on the time cards as allocated to this particular job for around $2300.00," and that it was being raised to $75,000.00.

Counsel for the defendant will file additional, substantial reasons in behalf of his motions when the notes of testimony have been transcribed.

OPINION.

(Filed Jan. 9, 1958.)

GANEY, J. January 9, 1958.

This is a motion for judgment of acquittal or in the alternative for a new trial. The defendant was found guilty under a bill of indictment charging that he "* * * did make and present, or cause to be made and presented, for payment and approval to the Department of the Army, an agency or department of the United States, a claim against the United States for radio-telephone electronic units on behalf of Espey Manufacturing Company, Inc., in the sum of $1,128,875.81, knowing such claim to be false, fictitious and fraudulent in that the aforesaid defendant made and presented or caused to be made and presented to the Department of the Army, a settlement proposal dated July 31, 1953, on behalf of Espey Manufacturing Company, Inc., which settlement proposal stated $1,128,875.81 was due and owing to the Espey Manufacturing Company, Inc., for radio-telephone electronic units which claim was false since said defendant well knew that the total amount due and owing to the Espey Manufacturing Company, Inc., on said settlement claim was substantially less than the amount claimed. * * *" The indictment was brought under Title 18 U. S. C., §287.

The reason advanced by the defendant in support of his motion for judgment of acquittal is that the prosecution failed to prove one of the essential ingredients of the crime charged in the indictment, that the claim submitted was fictitious and false, and under his motion for a new trial, that the Court did not leave to the jury the question whether the claim was false.

A number of witnesses were called by the Government, and there was a good deal of overlapping in testimony, but

a thorough consideration of the record reveals the following facts:

The Espey Manufacturing Company, Inc. ("Espey") entered into a contract with the Government dated June 16, 1950 for the manufacture of seventeen units of radio-telephone electronic units at a fixed price of $2,752,422.75. Espey had for some years prior to this date manufactured items pursuant to production contracts, and when it was awarded a contract, it would give the contract a job number for the convenience of its records. All costs such as labor engineering and material which could be attributed as being incurred in the performance of a certain contract were usually and customarily credited to the job number of the contract. All other costs were lumped under the heading of overhead, some of the items therein being heat, light, building maintenance, administrative salaries and expenses. The basic records for direct labor costs were the employees weekly time cards. When an employee performed work under a certain contract, the job number of that contract was written on his time card, and the number of hours spent and the amount of wages earned by that employee were placed after the job number. The total amount of the wages paid for work under a particular job number was posted in the weekly and monthly labor cost journal for that job number.

The electronic devices were to be fabricated in accordance with certain models and drawings which the Government agreed to furnish on dates specified in the contract, and Espey could not start mass production until it had produced an acceptable sample similar to the models supplied by the Government. Espey designated the contract as Job Number 381. There was tardiness on the Government's part in producing and supplying the necessary models and drawings, and a complete and comprehensive set of drawings was not made available until the latter part of November 1951, although drawings for certain sections were supplied in April and July of 1951. As late as January 19, 1952,

the Signal Corps advised Espey that the latest model of one of its sections would be substituted for an old one then in its possession. Allegedly because of the Government's tardiness in performance, Espey, on February 25, 1952, submitted a request to the Government for an increase in its contract price. This was known as a hardship claim, and in it Espey asserted it would lose approximately $1,300,000 if it completed the contract under the present arrangement.

The defendant, George Mastros, was employed by Espey in July of 1952, and while he attended the hearing on the hardship claim, he did not prepare the schedule which was handed to Mr. Moore of the Army Signal Supply Agency on September 5, 1952 showing costs totaling $26,000 on Contract Number 381. This schedule showed all costs to Espey from the date of the contract through December 31, 1951 which had been filed on August 15, 1952, and thereon it showed a sum of $919.59 for engineering labor. Kalish and Rubinroit, private accountants for Espey, participated and helped in the preparation of this schedule, and when later examined by Mr. Weiss, a Government auditor, these figures were proven out by Espey's books and records.

At the hearing on the hardship claim on September 5, 1952, there was talk by Nathan Pinsley, President of the Corporation, that some additional $400,000 in costs and additional engineering and labor was due and owing to Espey. The defendant, subsequent to the hearing, questioned an officer of Espey and one of its engineers regarding the amount of engineering labor. While he was told that a large amount of money was spent, Government auditors were never given any concrete evidence to substantiate any amount other than that set forth in the schedule, although requested on numerous occasions to so do.

On January 12, 1953, Espey submitted an invoice to the Signal Corps for payment of ninety per cent of the costs incurred on Job Number 381 from its inception to December 31, 1952. In the schedule supporting the invoice, under the itemized statement of the total costs incurred, direct labor

was listed as $3,880.02, the schedule containing the following certification signed by the defendant, George Mastros, as controller: "I certify that the above statement of costs is just and correct to the best of my knowledge and belief and that payment therefor has not been received and that it has been prepared from the books of account and records of Espey Manufacturing Company, Inc.".

On February 19, 1953, the Signal Corps, invoking its right to so do under an article of the Contract, terminated the Contract for the convenience of the Government. While Espey was preparing its termination settlement proposal, Mr. Weiss, an auditor of the United States General Accounting Office, visited the plant to audit the Espey books and records. He was given access to the cost summary journal for Job 381, which listed $2,314.92 as the amount expended for engineering labor up to March 31, 1953. This visit was on March 27, 1953. When Weiss questioned the defendant about Contract Number 381 and asked him for the papers and records with respect thereto, the defendant told him he could have the papers in about two weeks, but when he next saw them on April 7, 1953 in company with Rubinroit, one of the accountants for Espey, and Pinsley, president of the Company, they produced for him a cost ledger showing $2,314.92 for labor from the beginning of the Contract to the end of March 1953. Rubinroit told Weiss that there was about $75,000 worth of additional engineering which was put on the Job, and the defendant also said that the record was incomplete, and when Weiss asked for some evidence of the $75,000 additional engineering labor, he was advised that it was not available.

On June 17, 1953, the defendant gave Hollis, a Government auditor who was examining the records of the Company, a cost ledger showing a cumulative amount until June of 1951 for labor engineering and a monthly itemization from July of 1951 through April of 1953 showing $2,314.92. At this time, Hollis discussed Contract Number 381E with the defendant, but he did not at that time know of the

makeup of 381E, that it was not representative of time done on Job 381, but he assumed it was a proper record.

Carl S. Grossman, another Government accountant, testified that he saw defendant on September 21, 1953 while at the Plant auditing the settlement claim number three, and saw cards being changed. Seeing this, he became suspicious and, on October 5, 1953, after he had virtually completed his audit, he consulted Auditor Falchuk, who had made the audit on the hardship claim. There he saw that on the claim he was investigating, for the same cutoff period, December 31, 1951, defendant was claiming $72,000 from a build-up on Contract 381E, while in the hardship claim, it was only $919.00. Richard A. Miller, an F. B. I. Agent, testified that the defendant told him—and defendant admitted it as substantially true—that Contract Number 381E was set up pursuant to his instructions starting in March of 1953. Contract Number 381E was made up by erasing or crossing out on job numbers on weekly time cards of forty-seven contracts, none of which bore any relationship to Job Number 381, and the time taken from these jobs was entered as 381E. These clerks were instructed to take from these other contracts performed by Espey—and in almost every instance closed out—time from them, beginning in August of 1950 and ending with May of 1953. Furthermore, pursuant to his instructions, the weekly and monthly labor cost journals for Job 381 were changed to reflect an increase of $77,781.92, all of this amount taken from the newly created time on time card 381E which showed a total of $80,096.84 resulting from adding the $77,781.92 taken from other contracts to the $2,314.92 shown on the books of Espey for engineering labor through March 1953.

The alterations and transfers which took several months to complete were made without the defendant first determining whether engineering labor in the amount of $80,095.92 had been actually incurred on Job 381 and, as has been indicated, the claim itself was, at his instructions,

taken from some forty-seven other contracts, which contracts and the time for which had no bearing or relationship whatsoever to Job 381. The only justification which the defendant offered to his directing that the time cards from other jobs be used as a basis for the claim for $77,789.92 additional engineering costs was that in his judgment there should have been more additional engineering costs included in (1) the hardship claim wherein was listed $919.00 for engineering labor, and (2) the listing of $2,314.92 for engineering labor from the beginning of the Contract to March 31, 1953, inasmuch as he believed that in his judgment the engineering costs should have run two to three percent of the contract job. Additionally, by way of cross-examination, the defendant tried to prove that in former contracts, Espey, particularly one in 1951, had engineering costs in a Government contract that were three per cent of a $5,000,000 contract price. However, the Government auditor pointed out that this three percent was based on sales and billings, and since there were no such sales and billings here involved, that he was in no way justified in this particular instance. Further, another Government agent, Mr. Folcroft, an Army auditor with years of experience, testified that there was no percentage or any formula that one could use to arrive at the engineering costs of any particular contract such as this one, that a general conclusion could not be drawn, since one had to be familiar with the product and know exactly what was being made in each particular instance.

Three termination proposals were submitted asking for $1,128,875.81, the first one on March 31, 1953, the second on June 2, 1953, and the third on July 31, 1953. The third proposal listed engineering costs as having been $182,005.74, included in which was $80,096.84 for engineering labor; $77,781.92 of which was represented by alleged labor set forth in 381E. A detailed explanation of the amount was given as follows:

Expended material	$ 9,098.86
Labor	80,096.84
Engineering and overhead applied by the fiscal year	92,810.04
	$182,005.74

It was the great discrepancy between engineering costs in the hardship claim which ran through December 31, 1951 of $919.59, as well as the claim for engineering amounting to $2,314.92 showing the amount expended for engineering up to March 31, 1953, and the $77,781.92 for engineering labor set forth in Schedule 381E claimed from May 1950 to August 1953, which caused an investigation to be made by the General Accounting Office, which later called in the Federal Bureau of Investigation, and it was then discovered how the $77,781.92 in engineering costs represented by 381E was arrived at and which resulted in the prosecution herein.

DISCUSSION.

The statute under which this indictment is brought is U. S. C. A. §287.[1] The object of this section, which prohibits the presentation of false claims against the United States, was to prohibit the drawing of money from the Treasury of the United States by fraudulent claims, and, hence, this section reaches any person who caused fraudulent claims to be presented to the United States. *United States v. Brogren, et al.*, 63 F. Supp. 702. The presentation of a false and fraudulent claim for approval and payment to an agency of the United States Government was a crime

[1] Section 80 of Title 18 U. S. C., 1940 Ed. was divided into two parts. That portion making it a crime to present false claims was retained as this section. The part relating to false statements is now §1001 of Title 18.

under former §80 of Title 18 and is, accordingly, likewise a crime under this section of the Statute. *United States v. Michener,* 152 F. 2d 880.

It is the function of the trial court to weigh the evidence and to determine the credibility of witnesses. If there is competent and substantial evidence to support the verdict against the accused, viewing the evidence most favorable to the Government, the conviction must be affirmed. See *United States v. Empire Packing Co.,* 174 F. 2d 16. If we keep the focal point of our inquiry limited to whether a false claim was filed by the defendant against the United States, knowing that such claim was false, fictitious and fraudulent, the disposition of what otherwise seems a complex matter may be rather easily arrived at. A good deal of the record is taken up, especially on cross-examination, by defendant's counsel with making the inquiry whether or not $80,000 worth of engineering labor was done by Espey, and, while the Government did not prove that $80,000 worth of engineering was not done, there was no denial of the fact that the $80,000 shown as engineering labor on the third termination settlement of July 31, 1953 was not done on Contract Number 381, for which they presented the Government with a bill for $1,128,875.81. Accordingly, the question posed is whether the claim presented by the defendant was a false one, and whether he knew it to be fictitious and fraudulent.

A reading of the Court's charge shows clearly that the Court submitted to the jury the question of the falsity of the claim, as well as whether defendant knew it to be fictitious or fraudulent. It is obvious that while the Court referred once or twice to the fact that defendant did it and that he admitted it, the Court had in mind, and the context clearly shows, that defendant had admitted only the authorship of the makeup of 381E and in no wise attempted to trespass the province of the jury to determine whether the claim was false and that he knew it to be fictitious and fraudulent. The falsity of the claim and defendant's knowl-

edge of its being fictitious and fraudulent were referred to in the Court's charge on at least four or five occasions in instances such as: "Now the indictment alleges to you, and you must keep in mind, that he did make and present or cause to be presented a claim, *knowing said claim to be false, fictitious or fraudulent. That seems to be the nub or the essence of the case.*" And again, in reference to the testimony of Mr. Miller, an agent of the Federal Bureau of Investigation, whose testimony the defendant characterized as substantially true, where the Court said: "And finally when Mr. Miller, who was in charge of this investigation for the Federal Bureau of Investigation told you that in a statement orally this defendant admitted to almost exactly what the Government charged, *absent the requisite intent to defraud and to falsify.* * * *" Again: "And briefly, the Government says to you that this defendant presented this claim of $1,128,000. The figures don't mean much. It is nearly a million and a quarter, and of that claim the Government charges that some $80,000 *was false and fraudulent, and that defendant knew it, and that he intended to present it.* * * *" Again the Court charged: "The Government says when he did that he presented to the Government of the United States, the Department of the Army, *a false and fraudulent claim.*" Again, the Court said: "* * * to determine whether or not this defendant did this with intent to defraud the Government, whether he was conscious that *it was a false and fictitious claim, and if he did it, whether he did it with the intent to defraud the Government.*" And again: "On the other hand, you have the testimony of the defendant with all the elaboration that has been put to it, the various factors he said induced him to do what he did, and that he is not criminally guilty of *presenting a false, fictitious and fraudulent claim on behalf of this corporation with the idea of intentionally defrauding the Government of the United States.*" Again, in reading Point Fourteen at the request of defense counsel, the Court said: "* * * I want you to remember that that is a

factor that you can consider in determining whether this *presentation was a false and fraudulent claim with intent to defraud the United States.*"

As has been indicated, the defense has attempted to make much of rather vague statements that large sums have been actually spent for engineering, but whenever they were requested to show the records, something to substantiate their contention, they were told they were not available. Again, while it was shown that the defendant offered to have a Government engineer evaluate the engineering requirements on the job, it is to be remembered that this offer was made on October 8, 1953, more than three months after the alleged false claim was submitted by the defendant. Likewise, this was a fixed price contract and when terminated, the Government had to rely on the books and records of Espey to show what engineering was done on the Contract, because it would be a humanly impossible job to go to every employee of Espey and ask him how much engineering labor time he had put on Job 381 when the Company had some forty other contracts with the Government and private commercial firms upon which they were working. For them to recall three years later how much time in a week they had spent on Contract 381, without recourse to time records, would have been a sheer impossibility, and, accordingly, the Government had every right to rely on Claim 381E as a true and correct one. Accordingly, it would seem that the doctrine enunciated in *Rossi v. United States,* 289 U. S. 89, and later approved in *Holland v. United States,* 348 U. S. 121 at 138, where the Court rationalized its views as follows: "But where relevant leads are not forthcoming, the Government is not required to negate every possible source of nontaxable income, a matter peculiarly within the knowledge of the defendant." is to be applied in the matter before us. This rule does not shift the burden of proof, but only places the burden of going forward upon the defendant, and the Government must still prove every element of the defense

beyond a reasonable doubt. In the instant case, the Government has, through some six agents, attempted to get the correct estimate of the work done, where the defendant claims a vague amount larger than that which the books and records of the Company show, and has been utterly unable to secure any factual data upon which the alleged claim is made. Here, the defendant, produced Schedule 381E showing $77,781.92 worth of alleged engineering work done on a claim presented to the Government, which the Company was never able to substantiate by any records showing that this amount of work was done on Contract 381. It would seem that if defendant had any basis in fact for the submission of this claim and the amount involved in it, he should come forward with something to substantiate it. This is doubly true, since the defendant presented the contention that in his judgment three percent of the contract should include engineering costs, which was in conflict with the engineering costs shown on the books and records of the Company and prepared by an outside accountant.

Accordingly, the motion for judgment of acquittal and the motion for a new trial are denied.

JUDGMENT AND SENTENCE.

February 14, 1958. The sentence of the Court is that you, George Mastros, under Bill of Indictment No. 18367, under Count 1, undergo imprisonment for a period of thirty days. Execution of the prison sentence is suspended and you are placed on probation for two years, and a fine of $500 is imposed.

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 214

GEORGE MASTROS, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GEORGE MASTROS, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case of July 3, 1958.

OPINION BELOW

The opinion in the court below (Appendix A, *infra,* p. A1) has not yet been reported.

JURISDICTION

The judgment of the court below (Appendix B, *infra,* p. A2) was entered on July 3, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a conviction under 18 U.S.C. § 287 for making a false claim can be sustained where there is no evidence that engineering services in the amount set forth in the document in question — the only allegedly false item involved — were not actually performed.

2. Whether a conviction under 18 U.S.C. § 287 for making a false claim can be sustained which alleges that "the total amount due and owing * * * on said settlement claim was substantially less than the amount claimed," where the proof shows that the Government later paid a larger aggregate amount to the claimant on the same contract, and does not question that larger amount.

3. Whether an interim settlement proposal that is subject to change upward or downward constitutes a claim within 18 U.S.C. § 287.

STATUTES INVOLVED

1. Section 287 of Title 18, United States Code, provides as follows:

> **"§ 287. False, fictitious or fraudulent claims**
>
> "Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

2. Section 1001 of Title 18, United States Code, provides as follows:

> **"§ 1001. Statements or entries generally**
>
> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

STATEMENT

Petitioner was indicted on two counts, the first count (2a) charging him with making and causing to be presented for payment and approval a false claim against the United States on behalf of Espey Manufacturing Company, Inc., in the sum of $1,128,875.81, the alleged falsity being that the total amount due the company was substantially less, this in violation of 18 U.S.C. § 287. The second count, alleging the making of a false statement in violation of 18 U.S.C. § 1001, was dismissed by the District Court at the close of the testimony (1a, 312a, 313a).

Petitioner was found guilty on Count 1 after a five day trial (1a, 327a). Three days later, on April 16, 1956, petitioner filed a renewed motion for judgment of acquittal or in the alternative for a new trial (1a, 331a-332a).

This motion was denied on January 9, 1958, more than twenty months later (1a, 333a-343a). Petitioner

was sentenced to 30 days confinement, which was suspended; to pay a fine of $500; and he was placed on probation for two years (1a, 343a). On appeal, the court below affirmed, holding that the evidence was sufficient, and that the document presented constituted a claim within the statute (Appendix A, *infra*, p. A1).

A. The Basic Contract; Hardship Claim Based Thereon.

The alleged false claim here in issue arose out of a contract signed by Espey Manufacturing Company more than two years before petitioner entered their employ, and was submitted on behalf of and for the benefit of that corporation over the signature, except as to accounting data, of Sol Pinsley, a Vice-President (GX8, 34a-36a, 75a). Espey Manufacturing Company was not indicted; neither Sol Pinsley, the Vice-President, nor Nathan Pinsley, the President, was indicted; each claimed his privilege (42a, 181a, 182a), Nathan Pinsley doing so when called as a witness in this case (154a-155a). Petitioner, who did not and could not receive any personal benefit from the claim (22a, 136a-137a, 145a), and who talked freely to the F.B.I. (157a-158a, 255a) and to the Grand Jury (181a, 255a), is the only individual against whom the Government took action. As will be pointed out below, the amount ultimately paid Espey Manufacturing Company by the Government on the contract in question was more than was claimed in the document prepared by petitioner and in respect of which he was indicted and convicted.

But to particularize:

On June 16, 1950, the Signal Corps of the United States Army awarded to Espey Manufacturing Company (hereinafter called simply Espey) a contract to

manufacture 17,000 pieces of electronic equipment—complicated equipment for radio communication to and from Army tanks (4a-5a)—at the fixed price of $2,752,422.75 (GX1, 3a-5a). This contract was carried as Job No. 381 on Espey's books (7a, 46a, 47a, 48a).

On February 25, 1952, Espey submitted to the Government, under Title II of the First War Powers Act of 1941, as amended, a hardship claim, seeking reimbursement for losses incurred or estimated to be incurred on that contract (GX2, 6a). Supporting this hardship claim, Espey filed schedules, dated February 21, 1952 and revised August 15, 1952, of its costs incurred to that date and costs estimated to be incurred in order to complete its contract (GX3, 6a-7a). In this schedule, Espey listed total costs of $26,000 on Job 381 as of August 15, 1952 (7a). During March 1952, prior to its revision, this schedule had been audited by one Falchuk of the Army Auditing Agency, who testified that according to his work sheets $919.59 had been spent for direct engineering labor from the inception of the contract through the end of 1951 (49a).

The schedule had been prepared before petitioner was employed by Espey as its controller, beginning in July 1952 (177a, 228a).

A hearing on Espey's hardship claim was held by the Army Contract Adjustment Board in the Pentagon on September 5, 1952 (6a): the proceedings at that hearing constitute Exhibit D-1. Petitioner was invited to, and did, attend the hearing (239a-240a).

At the hearing, it was established that, in connection with Espey's contract, models prepared by Federal Telephone Co. and submitted to Espey had

been rejected by the Signal Corps, and that Espey in consequence had been required to redesign the equipment (23a-24a, 26a).

The record of the hearing contains considerable testimony showing that engineering redesign was necessary before Espey could get into production on the contract (24a, 26a, 27a, 28a, 29a).

At the hearing, Morris Pinsley, Espey's attorney (25a), said, among other things (27a, 30a):

> "We went through the trouble of going ahead and building this thing and giving it to the laboratories where at the present time it is approved, and up to this time we haven't put in any charges to the Government for this development and engineering, but it was done just the same."
>
> * * * * *
>
> "We have well over $400,000 in case [cash?] invested in the job, not including the engineering time which we had to put in in order to get the thing to a position where we accomplished the job without the Government's drawings."

On the basis of the estimated costs projected from the $26,000 figure in the revised schedule, the Board's decision authorized the making of a new contract with Espey, whereby the original authorization was increased by $600,000 (GX4, 8a, 25a).

B. The Termination Proposals.

On February 19, 1953, acting in accordance with the terms of the contract with Espey, the Signal Corps terminated that contract for the convenience of the Government (39a, 51a, 113a). Accordingly, Espey prepared its termination settlement proposal. As

explained by the Government's witness Moore (Tr. 18):*

> "Under most of the Government contracts having a contract consideration in excess of one thousand dollars the Government has incorporated in that contract an article designated Termination for the convenience of the Government, and the purpose of that article is to stop expense from occurring after it is determined that the need for this equipment is no longer necessary. Under the article the contractor is required to submit a termination claim or termination settlement proposal. In that proposal he itemizes the various elements of cost that make up the moneys alleged by him to have been spent. In this case it is direct material, direct labor, factory burden and general administrative expense and engineering expense—anything that represents costs incurred in the performance of this particular contract."

Espey submitted three successive settlement proposals, the first on March 31, 1953 (GX6), the second on June 2, 1953 (GX7), and the third on July 31, 1953 (GX8). All three were submitted by petitioner as Espey's controller (13a).

In those proposals, the engineering costs were given as $182,005.74, a total that was broken down as follows in the third proposal (20a):

Material	$ 9,098.86
Labor	$80,096.84
Overhead	$92,810.04

In an earlier document signed by petitioner (GX5), labor costs on the contract, as of December 31, 1952,

---

* References marked "Tr." are to the unprinted transcript of testimony.

were shown as $3,882.02 (11a). In the hardship claim, the engineering labor had been stated as $2,314.92 (56a, 68a).

Finally, on February 16, 1954, Espey over petitioner's signature submitted a revised statement of its settlement proposal as of March 31, 1953 (GX9, 17a-19a), which set forth $2,314.92 for engineering labor (15a), but was higher in the aggregate than any of the earlier proposals by some $200,000 (33a, 42a, 139a-140a, 255a).

C. Method of Preparing the Termination Proposals.

Petitioner, who had heard at the hardship claim hearing of the engineering problems arising from the submission of defective models to Espey (188a, 239a-240a), and who knew from his prior experience with another company and from other Espey contracts that engineering costs generally averaged from 2% to 3½% of the contract price (158a, 161a, 167a, 241a, 267a-268a, 276a), was convinced that the engineering costs originally shown on Job 381 were so far out of line as to be ridiculously low (239a, 240a). Petitioner expressed these views to Petker of the Espey organization, who estimated that at least $60,000 in engineering costs had been spent on the project (242a).

At the time petitioner was employed by Espey, he found that its records were being haphazardly kept (229a-231a), in particular that the payroll cards were neither filled in nor signed by the engineers (231a). Accordingly, in order to make the engineering costs on Job No. 381 more closely approximate what he believed was the fact, and to correct what he considered to be a sizeable error (300a), he instructed the cost clerks to make changes on the payroll time cards (114a,

158a-163a, 242a-244a) so that about 2 per cent of the total sales price would be charged as engineering costs (178a) under the designation Job No. 381E (57a, 59a; GX20), the "E" representing engineering (83a, 109a, 116a, 242a).

Petitioner testified that although the amount charged to 381E was an estimate, he considered it "a reasonable assumption based on the fact that the company's rate of engineering on contracts was at least 2 per cent" (276a-277a), and on the fact that "All the paper work concerned was wrong" (277a).

The changes effected on the payroll cards were openly made, in full view (77a), and the changed entries were all identified as 381E. Petitioner freely discussed the changes he was making with auditors for the Air Force (59a-60a), including one Grossman, who was disturbed at the discrepancy between the engineering costs stated in the hardship claim and those set forth in the settlement claim (79a, 81a, 111a, 114a-116a). Thereafter petitioner discussed the case freely with the F.B.I. (157a-172a), made a voluntary statement (157a-158a), and testified before the grand jury (181a) that indicted him.

Ultimately, Espey received on its fourth settlement proposal, which did not include the higher engineering costs (GX9), more from the Government (33a, 42a, 139a-140a, 255a) than it claimed under the third proposal (GX8) which included the allegedly fraudulent figure of $182,005.74 for engineering expenses.

D. Evidence of the Truth or Falsity of the Engineering Costs Contained in the Third Settlement Proposal.

Except insofar as the hardship claim (GX3) and the first, second, and fourth settlement proposals (GX6, GX7, GX9) listed total engineering labor at $2,314.92, no evidence was introduced by the Government to show that petitioner's estimate of $80,096.84 for direct engineering labor in the third settlement proposal (GX8) was false.

Moore admitted that he did not know whether the total of $180,000 for engineering was justified or not (40a). Falchuk did not know anything about the $180,000 claim nor whether there had been 50 engineers working there or not (Tr. 77). Weiss testified (69a-72a) that he was told in April of 1953, before the settlement proposal was filed on July 31, 1953, that "there was about $75,000 worth of additional engineering labor which was expended which was not included in the figures" originally mentioned; that "it was a contractor's policy not to distribute labor for pre-production payroll until production was initiated and it was not yet fully distributed at the time I was there"; that "there was a change being made increasing what had originally been on the books and on the time cards as allocated to this particular job for around $2300, that it was being raised to $75,000"; that "there would be about $75,000 additional engineering labor"; and that he, Weiss, did not know whether it should have been $75,000 or $750,000 or $3,000. Grossman similarly admitted that he did not know how much engineering work had been done (85a). Goldenberg testified that he did not know how much engineering time was spent on Job 381 (138a). Miller testified that he was not prepared to say that $80,000

worth of engineering had not been incurred on the job (179a).

While the Government did not undertake to establish the falsity of the $180,000 claim for engineering, petitioner was substantially restricted in his efforts that show that substantial engineering costs had actually been incurred by Espey.

Kuhn, general manager of Parts Producting Corporation, which was called in to build relays needed by Espey for its Job No. 381 (206a-208a), testified that he was familiar with Espey's work and particularly with Job 381 (208a-215a). He further testified (210a-211a):

> "Now, during this period I had many occasions to speak to Espey personnel, and they were telling me that they had nothing but engineering problems; they had to make trips to Fort Monmouth, they had to make trips to Federal, they had these engineering discussions, and they were building up a mammoth engineering cost, I thought, so that they could not possibly come out whole on the job, and I heard this morning some figures mentioned of $80,000. Anyway, it so happened that I did all the estimating and all of the bidding not only for Parts Production Corporation but also for the old Allen D. Cardwell Manufacturing Corporation, and I am fully conversant with costs, whether product costs or engineering costs, and with due respect to the opinions that have been advanced here I can tell you that $80,000 would not nearly cover the engineering charges on this job. It could not possibly.
>
> "Q. Why do you say that?
>
> "A. Unless it was charged to something else. Here is a contract, as I recall, that ran $3 million or more. It would have been simple if they had

a prototype which had been approved and able to work, drawings and manufacturing drawings which they could follow, and even then I know that you always have engineering problems, particularly when it comes to electronic equipment. There are always changes; there are always variations in materials you get. The temper of a piece of metal could be different. Engineers must be called in to see what changes must be made in manufacturing and technical procedures. So far as materials, they cannot say because two years ago we made it, we can make it that way now; there are refinements which you cannot well determine. Materials that come in must be carefully inspected so that they can be properly used to get the proper end result, and on a $3 million contract even if there were practically no engineering required, I do not think $80,000 would be too much."

Then:

"Q. Are you familiar—can you tell the Court and jury why $80,000 engineering is more fair or more relative to this project than $2000?

"A. Yes.

"Q. Do you know why?

"A. Yes.

"Q. Well, tell us."

At this juncture the following colloquy took place (216a-217a):

"The Court: No, I sustain the objection unless this witness can state precisely that $80,000, or the figures which are allegedly presented to the Government, that that amount was performed on this specific job. If he can show that, if he knows that—and I don't know how he can, I will permit it. If he can show these figures on that specific

job—and I would certainly want him qualified as to where he found the records to enable him to say that that much was expended—cannot represent his mere opinion, whether 3 to 5 per cent ought to have been charged. That is an opinion, and he may be a competent man, but it does not further us in the determination of whether that amount was expended on 381. It may well be, as this defendant allegedly is supposed to have said, that it ought to be 3 per cent, but that is not our problem: Our problem is whether this was falsified to the extent of some $70,000 on this particular job.

"Mr. Kossman [counsel for petitioner]: Yes.

"The Court: I don't care whether the work was actually done—maybe more was done—it would still be false even if it were within a penny of it.

"Mr. Kossman: Do you mean to say, Your Honor, if there was one cent missing that this would be a false claim.

"The Court: It may well be. It would only go in mitigation. If I steal a penny, I am guilty of larceny under proper circumstances, and I am just as guilty as though I stole half a million.

"Mr. Kossman: But the defendant is not charged with stealing anything.

"The Court: I was giving what I thought of as a parallel analogy; it might not be too parallel, but it doesn't make any difference. If this witness can show that $80,000 was expended on 381 I will hear it; otherwise I don't want his personal judgment.

"The Witness: I would have no way of giving the exact amount. I can say this, though, there would have been probably three or four or five engineers working constantly on this at Espey over a period of a year that I was familiar with."

Cardwell, the chief engineer of Parts Producing Corporation, testified that on numerous trips to Espey he had seen engineers working on 381 (223a-226a).

The district judge, however, took the position that, because petitioner had admitted changing records, there was no factual issue in the case as to the truth or falsity of the claim. The following colloquy sets forth the court's views (305a-307a):

> "The Court: No, I think your approach to this, or else mine, is entirely wrong. I don't see any factual question, because this defendant has said that substantially what the F.B.I. agent said was correct. By his own admission, he has submitted a wrong claim. He had said that he submitted a claim which he ordered the erasures on, involving forty-seven jobs that had no relationship whatsoever; the work he put in that claim was not done on this job; it was taken from forty-seven other jobs and put in there. Now, that in and of itself comes within the statute of submitting a false and fraudulent claim if the jury, laying it in the context of the whole, say that he did it wilfully and with intent to present a false claim. All this other thing that the Government has allowed to go in—I have long since reconciled myself to that attitude—if they say fit to have it go in, it just went in—I think is all irrelevant. I think it is immaterial. And you went ahead, without any objection being entered. But on that fact alone, on this own admission, there is no question left here except his mental state—none at all.
>
> "Mr. Kossman: If the Court please, I have probably not made it as clear to the Court as I have it in my mind. There was no admission to the F.B.I. agent at any time that there was a false claim made.

"The Court: Now, wait a minute. I am so sated with this. It is so obvious that I don't think it can even bear repetition by me. Here is a man who went out, went to forty-seven jobs, took them right out of the air and put them in a claim which he represented to the Government was the proper engineering cost of this contract.

"Mr. Kossman: That is right.

"The Court: He went out and he did it, and I say that the jury can say that that was a fraudulent claim, because he has not here in his own defense stated what ground he had. He lulled the Government into a sense of security by submitting that claim, that that work was done on that job. Why the Government did not hew to that line, I don't know, but that is in the record, and that is sufficient to take this case to the jury.

"Mr. Kossman: If the Court please—

"The Court: There is no question about that. I have yet to see a clearer case, on an admission by the man himself who says that it is substantially true. We have wasted a couple of days, in my judgment.

"Mr. Kossman: If the Court please, we gave the basis—

"The Court: I am not going to argue whether he is guilty or innocent. I won't do that. You can argue that. I am just saying that the man on his own admission said, 'I went out and took forty-seven jobs that had no bearing on this at all and I put it in this claim 381.'

"Mr Kossman: Because time was actually spent there.

"The Court: I don't care what time was spent. There may have been more time spent. We are not asking the reasonableness of the 2 or 3 per cent. It

may have been reasonable or fair, but he had no right, and the jury can so find that he did not have the right, to take work on forty-seven other jobs and put it in here and lead the Government to assume that that work was performed on this job.

"Mr. Kossman: He is not charged with that. He is charged with submitting a false claim. If there is no false claim in fact, there is no false claim.

"That is Point No. 1.

"The Court: That, he has admitted. He takes himself out of the realm of possibility; it is what he did."

The case was submitted to the jury on the same theory (317a-320a, 323a). In order not to lengthen the present petition unduly, the cited portions of the charge will not be printed.

As has been indicated, petitioner was found guilty, a motion for acquittal and/or new trial was denied, and on appeal the conviction was affirmed (*infra*, pp. A1, A2).

REASONS FOR GRANTING THE WRIT

Only occasionally, as in *Washington v. United States*, 357 U.S. 348; p. 331, J. Sup. Ct., Oct. T. 1957 (No. 1012, decided June 23, 1958), reversing 253 F. 2d 913 (C. A. 7), is this Court called upon to reverse a criminal conviction because of the insufficiency of the evidence. The present proceeding is another such case. It involves the prosecution of a corporate underling for an alleged false claim from which he could not and did not personally benefit, a prosecution frankly undertaken because he did not implicate his employers who successfully claimed their privilege (*infra*, pp. 22-

23). Apart from that, the absence of proof in the present record makes this a case that literally cries out for review.

First. There is no evidence in the present record that establishes the falsity of petitioner's representation in the third interim settlement proposal (GX8) that some $80,000 in direct engineering labor was actually expended on Job No. 381.

The prosecution proved that petitioner informally and unconventionally reconstructed what he believed to be the amount of direct engineering labor attributable to Job No. 381, and that he submitted this amount in the third interim settlement proposal which was forwarded to the Government. But the Government's proof never showed how much engineering labor in fact was expended on the job, and therefore never proved that the amount submitted in respect of engineering labor was, *in fact,* erroneous. The question is not, as the district judge assumed throughout, at the trial (216a-217a, 305a-307a; quoted *supra,* pp. 12-16) and in his charge to the jury (317a-320a, 323a), whether petitioner admitted constructing a statement to produce what he believed to be an accurate estimate of engineering costs. The question is whether his final total of such costs was true or false—and on that single, crucial issue, there was no proof.

Such decisions as there are on the point hold that technical inaccuracies do not amount to false claims (under the civil statute) in the absence of falsity in fact. *United States* v. *Park Motors,* 107 F. Supp. 168; *United States* v. *Beaty Chevrolet Co.,* 116 F. Supp. 810; both E. D. Tenn. In both of these cases, the bills were inaccurate, but in both it was held that the claim

was not false because the amount due from the Government was correctly set forth. Under that rationale, the present case presents an *a fortiori* situation in petitioner's favor, because here the Government never adduced independent proof of the figure for direct engineering labor.

Two analogies lend further support to petitioner's position.

In income tax cases, it is clear that "a conviction upon a charge of attempting to evade assessment of income taxes by the filing of a fraudulent return cannot stand in the absence of proof of a deficiency." *Lawn* v. *United States*, 355 U.S. 339, 361. Here Espey, petitioner's employer, eventually received more in the aggregate on its fourth settlement proposal (GX9) than the total sum petitioner had set forth in the third settlement proposal (GX8) in respect of which the present conviction was had. Just as there can be no income tax conviction in the absence of a deficiency, so, it is submitted, there can be no conviction for presenting a false claim when the government by paying more on a subsequent claim admits that the earlier one's inaccuracy harmed only the claimant.

Here the indictment charged petitioner with preparing a settlement proposal which "was false since said defendant knew well that the total amount due and owing to the Espey Manufacturing Company, Inc., on said settlement claim was substantially less than the amount claimed" (2a). Inasmuch as the Government eventually paid Espey more in the aggregate on the fourth settlement proposal (GX9), with a smaller figure for direct engineering costs, than on the third such proposal with the higher engineering figure that

petitioner had prepared, it is evident that the Government failed to prove the gist of its allegation.

It is true that the proposal prepared by petitioner, with its understatement of the aggregate sum due, and its alleged overstatement of one item, may have come within 18 U.S.C. § 1001 (*supra*, p. 3) if it was false in fact. But here the count laid under that provision was dismissed (1a, 312a, 313a), and the conviction now in question was had under the criminal false claims provision, 18 U.S.C. § 287 (*supra*, p. 2).

Another analogy is found in cases of perjury; there it is well settled that evidence of inconsistent statements made by a defendant under oath does not, without more, prove that one of them was perjurious. Cf. *United States* v. *Harris*, 311 U.S. 292; see *United States* v. *Nessanbaum*, 205 F. 2d 93, 95-96 (C. A. 3); *McWhorter* v. *United States*, 193 F. 2d 982, 983-984 (C. A. 5); *United States* v. *Buckner*, 118 F. 2d 468 (C. A. 2). In *United States* v. *Golan*, 24 F. Supp. 523 (E. D. Pa.), Judge Maris applied the same rule to the offense of submitting a false statement in an immigration proceeding. Identical reasoning requires that the offense of submitting a false claim be governed by a like rule.

On that footing, the proof fails: All that the Government showed was that Espey (GX3, GX9) and petitioner (GX5) had submitted documents that placed a different figure on the engineering costs. But this proof of inconsistent statements does not establish that one of the statements was false.

Here the trial judge not only assumed throughout that petitioner's frank admissions that he had attempted to reconstruct the actual engineering expenses incurred on Job No. 381 amounted to an admission

that he had prepared a false claim, but the court seriously impaired petitioner's efforts to establish the correctness of his conclusion by testimony as to the amount of engineering work actually performed. See pp. 14-16, *supra*. Thus the district judge not only shifted the burden of proof of falsity from the prosecution to the defense, he also prevented the defense from carrying the improperly shifted burden.

It follows that, in the face of the rulings at the trial, petitioner has not been able satisfactorily to establish the truth of his representations. But what is more significant here is that the Government made no effort, and so utterly failed, to establish their falsity.

Second. There is a second question in this case, which may be reached alternatively or secondarily. It is this, whether the interim settlement proposal prepared by petitioner was "any claim upon or against the United States" within 18 U.S.C. § 287. The court below (*infra*, p. A1) answered the question in the affirmative, citing *United States* v. *Cohn*, 270 U.S. 339, and *United States* v. *McNinch*, 356 U.S. 595.

In view of the present terms of 18 U.S.C. § 287, neither citation is pertinent. It is true that both the present criminal false claims statute, 18 U.S.C. § 287, and the present civil false claims statute, 31 U.S.C. § 231, were originally enacted as a single section, § 3 of the Act of March 2, 1863, c. 62, 12 Stat. 696, 698. The present civil provision, which was considered in *McNinch*, still contains the clause, "for payment or approval," and that clause was a part of the predecessor criminal statute, § 35 of the Criminal Code, that was construed in *Cohn*. But the latter provision was in 1948 separated into two sections of Title 18, §§ 287

and 1001, both omitting the clause "for payment or approval." Consequently the present settlement proposal is not a "claim" within 18 U.S.C. § 287, first because of the statutory changes, and second in the context of the present case, which plainly shows, on the Government's own evidence (32a), that it was only an interim proposal, subject to revision upwards or downwards. It may well have been the basis for a later claim, but it was not a claim within the narrow terms of 18 U.S.C. § 287.

The scope of the Government's current contract settlement activities, in the face of the changed statutory language, calls for review of this question—assuming it is reached—because of its obvious public importance.

Third. This is not a prosecution in which the Government can take pride.

1. The trial judge repeatedly expressed to the jury the view (317a, 318a, 320a, 323a) that petitioner's admission that he had attempted to reconstruct the engineering cards on Job No. 381 by altering cards and carrying them to an account numbered 381E amounted to a confession that petitioner had concocted a false claim. This was obviously erroneous; the critical issue, as has been pointed out, was the truth or falsity of the representation made, not the mode of its preparation.

2. The trial judge refused to charge as requested (No. 13, 330a) that "A wrongful purpose is an essential element of the offense of making a false representation or a false claim and if the defendant did not have a wrongful purpose in making a claim or representation, even if it is erroneous, your verdict must

be not guilty." That proposition was elementary, it was obviously correct, and refusal to charge even the substance of it was plain error.

3. Here are excerpts from the Government's argument in rebuttal (Tr. 519C, 519C-519D, 519F, 519I, 519L):

> "This is a young man, of course, who has worked hard in his life. He made a mistake. I have no question but what he repents. I have no question but that he is due some compassion, but that is not my function; that is not your function; that is Judge Ganey's function subsequent to a verdict of guilty, which is your function."
>
> * * * * *
>
> MR. FOGWELL [Assistant U. S. Attorney]: Well, sir, I do not wish to press the point, except that I think Mr. Kossman brought it up, seeing that the Pinskys* ought to be punished. I agree. I agree, and there is nothing we would rather do in this courthouse, but the only way we will ever be able to do it is through the cooperation of this defendant.
>
> "MR. KOSSMAN: I object to that, Your Honor.
>
> "THE COURT: No, it is competent.
>
> "MR. FOGWELL: That is the only way we will ever be able to punish the Pinskys. No. But as Mr. Kossman says they have put up an iron curtain; they have put a wall in front of the thing

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* The family name of the owners of Espey was "Pinsley". There is no mention in the testimony of "Pinskys." Inasmuch as the prosecutor himself called Nathan Pinsley as a Government witness (149a), it is difficult to believe that the references here and in subsequent portions of the summing up to "Pinskys" were inadvertent, and equally difficult to believe that the transposition of names was not calculated to prejudice petitioner. Cf. *Ross* v. *United States*, 180 F. 2d 160, 167-168 (C. A. 6).

as is their constitutional privilege. This is their constitutional privilege, laid down many years ago by the founders of this country.

"And this young man won't cooperate with the Government. He has told his story. All right, what happened to the rest of them?

"As I say, the Pinskys told him to do this thing, to erase these cards, and he should have taken the bull by the horns, and I suppose now he regrets it. He should have said, 'No; I quit this job. I will not do that.' But he didn't."

* * * * *

"The question of whether the Pinsleys, Pinskys, or anybody else were connected or not connected with it is not for you to decide. As Mr. Kossman has said, there is no evidence on the record that they have not been indicated, and I will tell you very honestly, I do not think they have been indicted. As a matter of fact, I feel very confident that they have not.

"There is also on the record the question of whether they will or won't, and that is not known either, but I would like nothing better than to indict them, every rotten one of them, every rotten one of them, and I don't care who they have for lawyers—ex-judges, Tom Dewey, anybody else—that means nothing."

* * * * *

"If I am a first offender I am due some compassion, but, of course, that is not the jury's function under our American system of justice today. That is the judge's function.

"MR. KOSSMAN: If the Court please, I wish he would not talk about 'compassion.' Compassion has no play in these things.

"THE COURT: Well, all right.

"MR. FOGWELL: It is still a crime, nonetheless. The fact that the Government did not pay out these sums of money which the defendant prepared these

forms for has nothing to do with it. The only question is, were they wrongfully prepared? Were they submitted to the Government? And was G-8, the famous G-8, a false and fraudulent statement?"

* * * * *

"It is of no moment at all—no moment at all—how much engineering was or was not done in this case. The only question, as I think Judge Ganey will tell you—the only question is, there really isn't any question, because the defendant admits that the statement was false that he sent in; he admits that the records weren't there; but it is of no moment as to how much engineering was or was not done."

4. Petitioner did not ask for a new trial below on any of these grounds, preferring to press for an outright judgment of acquittal. In those circumstances he is probably not free to raise them now. This Court, however—see Rule 40(d)(2) of the Revised Rules of 1954—is not thus limited. Accordingly these additional matters have been set forth, in order that it may be made apparent why the demands of justice require review of the present case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for the Petitioner.

JULY 1958.

APPENDIX A

Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,582

UNITED STATES OF AMERICA

v.

GEORGE MASTROS, *Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 13, 1958

Before KALODNER, STALEY and HASTIE, *Circuit Judges*

Opinion of the Court

(Filed July 3, 1958)

PER CURIAM.

The appellant was convicted of filing a false claim against the Army in violation of Section 287 of Title 18 of the United States Code.

After a careful study of the record, we are convinced, contrary to appellant's contention, that there was ample evidence upon which the jury could base its verdict.

The claim, which was prepared in the form of a settlement proposal, clearly sought the collection of money from the United States Treasury. It is thus a "claim upon or against the United States" within the meaning of 18 U.S.C. § 287. See United States v. Cohn, 270 U.S. 339 (1926); cf. United States v. McNinch, — U.S. — (decided May 26, 1958).

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Judgment Below

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,582

UNITED STATES OF AMERICA

v.

GEORGE MASTROS, *Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: KALODNER, STALEY and HASTIE, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF
Clerk

July 3, 1958

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476888—58

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 214

GEORGE MASTROS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the Court of Appeals (Pet. App. A) is not yet reported. The opinion of the District Court denying petitioner's motion for a judgment of acquittal, or in the alternative for a new trial, appears at R. 333–343.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on July 3, 1958 (Pet. App. A). The petition for a writ of certiorari was filed on July 24, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] "R." refers to petitioner's appendix in the Court of Appeals. Also filed with this Court are the trial exhibits and the trial transcript.

QUESTIONS PRESENTED

1. Whether a settlement proposal for moneys due on termination of a government contract which set forth the cost figures on which final payment would be fixed is a "claim upon or against the United States" under 18 U. S. C. 287.

2. Whether the evidence supports the verdict.

3. Whether there were trial errors which should now be noted, despite failure to object thereto below.

STATUTE INVOLVED

18 U. S. C. 287 provides:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Following a jury trial held in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on count one of a two-count indictment, which charged that petitioner submitted to the Department of Army a settlement proposal dated July 31, 1953, on behalf of the Espey Manufacturing Company, Inc., "knowing such claim to be false, fictitious and fraudulent * * *" in viola-

tion of 18 U. S. C. 287 (R. 2).[2] Petitioner was sentenced to thirty days' imprisonment and fined $500.00. Execution of the prison sentence was suspended, and petitioner was placed on probation for two years (R. 343). The judgment was unanimously affirmed by the Court of Appeals (Pet. App. A).

The pertinent evidence may be summarized as follows:

1. On June 16, 1950, the Signal Corps of the United States Army awarded Espey Manufacturing Company a two million dollar contract for the production of electronic communication equipment for use in Army tanks (Gov. Ex. 1; R. 3–5). This contract was carried on the books of the corporation as "Job Number 381" (R. 5, 7–8, 47–48). On February 25, 1952, Espey submitted a hardship claim, as authorized by law, asserting that it would incur losses under the contract (Gov. Ex. 2, R. 6). In its supporting schedule, it estimated that, from the inception of the contract until December 31, 1951, it had incurred manufacturing costs of $26,000, including $919.50 for engineering labor (R. 47–49). After hearings, the Army Contract Adjustment Board granted a $600,000 increase in the contract price (Gov. Ex. 4, R. 7–8, 31). Petitioner, who had been hired as controller of the corporation in July 1952, attended the hearings but took no part in the discussion (R. 228, 239).

[2] The second count, charging the making of a false statement in violation of 18 U. S. C. 1001, was dismissed by the district judge at the close of the testimony (R. 2, 312–313, 326).

On January 12, 1953, Espey submitted an invoice for reimbursement of costs incurred pursuant to a progress payment provision in the contract, as modified, providing that the company could be reimbursed with 90% of its direct labor costs. The attached schedule showed direct labor costs (including engineering labor) from the inception of the contract until December 31, 1952, to be $3,882.02 (R. 9–12). The schedule contained a certificate executed by petitioner that the statement of costs was "just and correct" (R. 9).

In March 1953, Louis L. Weiss, an employee of the General Accounting Office, visited Espey for the purpose of reviewing its hardship claims (H. 64–65). He requested from petitioner the papers relating to Job Number 381. After some discussion with petitioner, the firm's accountant, and the firm's attorney, he was given in early April, with apparent "reluctance", two records relating to Job Number 381 (R. 67). These revealed that from the inception of the contract until March 31, 1953, engineering labor costs were carried at $2,314.00, production labor at $2,328.00 (R. 68). He was told that the corporation was processing a termination claim (R. 66) and that there was about $75,000 worth of additional labor not included in the hardship figures. He was shown no supporting documents to support this claim (R. 69–70).

2. The Signal Corps had terminated the contract in February 1953 for the convenience of the Government (R. 39, 113). Thereafter Espey submitted three termination settlement proposals, with covering letters signed by petitioner (Gov. Exs. 6–8, R. 12–14).

The figures were stated to be based on actual costs (R. 18). Settlement proposal No. 3, which was charged to contain the false claim, was broken down as follows (R. 20):

Material	$9,098.86
Labor	80,096.84
Overhead	92,810.04

Although the company records apparently supported it, the labor cost of $80,000 seemed excessive to the auditor investigating the proposal (R. 77–79). Consequently, the auditor decided to compare the original hardship claim with the settlement proposal (R. 79). This comparison revealed that, while engineering labor was a little over $919 in the hardship claim from the start of the contract until December 31, 1951 (see *supra*, p. 3) for the same period, the termination proposal contained an amount of over $72,000 for engineering labor (R. 114). The additional amount was taken from a buildup of engineering charges under a designation No. 381E, which was not contained in the hardship claim (R. 79, 81–82). This was the only contract for which an auxiliary job number was set up (R. 116). When the corporate books had been examined in connection with the hardship claim in March 1952, there was no account No. 381E on the books (R. 49).

3. A special agent for the FBI, who was assigned to the case in late October 1953 (R. 157), had three conversations with petitioner. Petitioner also executed a sworn statement (R. 157). Petitioner admitted that he had caused the transfer of $77,000 of engineering labor from forty-seven other jobs to this particular contract, and allocated this amount to an

account designated 381E (R. 157–158). He had instructed three cost clerks working at Espey to make transfers from the labor charged to these other jobs so that the amount of engineering labor charged to Job Number 381 would amount to 2%–3% of the value of the contract (R. 158). These transfers were started in March 1953, and were made for the period August 1950 through May 1952. He did not inform the clerks which contracts to make the transfers from, nor did he know from which contracts sums were actually transferred until after he had compiled an analysis at the agent's request (R. 158–159). To effectuate these changes, the time cards were modified, by erasing the original job numbers and charging time worked to 381, under the designation of 381E (R. 159, 168). Petitioner said he had not used a journal entry system to make these changes, although it would have saved a great amount of time, because he had not thought of it (R. 160). These transfers were made from contracts, some of which were still open, without first determining whether the labor cost had been properly charged to these contracts in the first instance (R. 161–162, 169). Petitioner gave as his reasons for these transactions his belief, based on former experience, that the $2,314 figure for engineering labor was too low and that 2%–3% of the sales value of a contract of this type would more truly reflect engineering labor (R. 158, 166–167), and from what he had heard at the hearing on the hardship claim in 1952 as to engineering labor expense (R. 188).

Petitioner indicated he had not reviewed this contract. In the agent's opinion, it was difficult to understand how any arbitrary percentage could reflect labor costs without knowing the type of contract involved (R. 167). The agent also testified that a change of the labor cost by altering the time cards, instead of making journal entries, concealed from the Air Force auditors the basis upon which engineering labor was computed (R. 178).

Petitioner, when he took the stand, admitted that the agent's résumé as to what petitioner had said was substantially correct (R. 254). He himself testified that, while 2% of the contract price as engineering labor was, in his opinion, a "reasonable assumption", it was not based on any factual paper work, nor on any intensive discussion with the engineers as to the actual engineering cost incurred on Job Number 381 (R. 276–277, 269).

4. Some time after the FBI was brought into the case, on February 16, 1954, Espey submitted a revised proposal, setting forth only $2,314.92 for direct engineering labor (R. 138, 140). On cross-examination of a government auditor, petitioner brought out the fact that, even with the engineering costs reduced, the total claim was more than that in the proposal on which the indictment was based. The auditor stated that there was a reason for the difference (R. 140).

ARGUMENT

1. Petitioner contends (Pet. 20–21) that the settlement proposal on which the indictment was based is not a "claim upon or against the United States"

within the purview of 18 U. S. C. 287 because it was an interim proposal subject to revision upward or downward. This argument misconstrues the function of the settlement proposal.

The regulations in effect when the proposed settlement was submitted provided for the filing of a settlement proposal "setting forth *the amount claimed to be due* by reason of the termination." 32 C. F. R. 8.503–1 (Emphasis added). Any ultimate payment would have to include reimbursement for actual costs. The settlement proposal was therefore not merely a basis for discussion; it was a claim for money due as of right. The fact that the rights claimed might be subject to challenge as inaccurate does not alter the fact that money was being demanded from the United States. The proposal was thus a "claim upon or against the United States" within the meaning of 18 U. S. C. 287. *United States* v. *Cohn*, 270 U. S. 339, 345–346. See also *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 543–544; *Rainwater* v. *United States*, 356 U. S. 590; *United States* v. *McNinch*, 356 U. S. 595.

Petitioner attempts to find support for his position in the fact that the language "for payment or approval" contained in the pre-1948 provision was omitted from 18 U. S. C. 287, thus evincing—he urges—a Congressional purpose to excise from statutory coverage a claim subject to revision. This novel argument has no merit. On petitioner's logic, if a false claim made for "approval" is not a crime under 18 U. S. C. 287, a false claim for "payment" would also be outside the statute, since both words were

omitted from the 1948 revision. A claim by its nature must be for approval or payment. The omission of the two words was not designed to work a substantive change, but to eliminate redundancy. This is confirmed by the revisor's notes that "Minor changes in phraseology were made."[3]

2. The attack on the sufficiency of the evidence is without merit. Petitioner argues that, although the prosecution proved that he "unconventionally reconstructed" direct engineering costs in the third settlement proposal, there was no evidence to show what the true engineering costs were (Pet. 17–20). But the Government had to prove only that the claim was false—not the exact amount of the falsity. The evidence established that, in a radical departure from existing records and contrary to prior statements as to labor costs, petitioner as controller of the firm, for the purposes of the termination proposal, modified the time cards so that an additional $77,000 not shown in the hardship claim was reflected as engineering labor costs incurred under the contract. This was done by arbitrarily reducing sums from other contracts and allocating them to a special fund designated 381E. This transfer was not based upon reexamination of the actual costs incurred under the contract, nor upon a determination of whether the changes incorrectly reduced actual engineering costs originally allocated to

[3] Section 287 derives from 18 U. S. C. 80 (1940 ed.). By the 1948 revision, Section 80 was divided into two parts: (1) the portion making it a crime to submit false claims became present Section 287, and (2) the part relating to false statements became 18 U. S. C. 1001. H. Rep. No. 304, 80th Cong., 1st Sess., p. A 25.

other jobs on a direct cost basis. The item of $80,000 for labor costs was thus, by petitioner's own admissions of how he reconstructed that item, not a statement of the actual labor costs, as it purported to be. The claim which included this item as one on which reimbursement was due was therefore false.

The judge did not, as petitioner claims, foreclose petitioner from showing that the reconstruction was proper on the basis of actual costs.[4] In refusing to permit Alfred S. Kuhn, general manager of one of Espey's subcontractors, to testify as to his personal opinion as to whether the change in costs were proper, the judge held that Kuhn had not been shown to be intimate with the work performed under the contract or qualified to pass judgment on the costs actually incurred (R. 211–212, 216). The trial judge further pointed out that petitioner was in no way foreclosed from calling engineers who had worked on the contract to support his cost analysis. Petitioner did not call any of the engineers.

Petitioner also argues that the evidence was insufficient to establish a false claim because there was evidence that the ultimate proposal, filed after that here involved, was for a higher total amount, even though the claim as to the engineering labor costs was reduced

[4] The excerpts from the colloquy between the trial judge and defense counsel (R. 305–307), relied on by petitioner for his claim that the jury never dealt with the issue of falsity (Pet. 14–16), occurred out of the presence of the jury on petitioner's motion for a judgment of acquittal (R. 305–307). Read in totality, it is clear that the charge itself left that issue with the jury. (See R. 313–327, particularly at 316, 319–320; compare the opinion of the District Court at R. 340–342.)

by approximately $77,000. The fact remains, however, that the claim presented did contain a claim for reimbursement of an excessive amount for labor costs. As of the date is was presented, for what it purported to cover, the claim was false.[5] The fact that a subsequent proposal may have been higher because of the legitimate increase in other items does not affect the falsity of the claim that was presented at the time it was presented.

3. Lastly, petitioner contends that his conviction should be reversed because of alleged trial errors. As he admits (Pet. 24), these alleged errors were not raised below, and in any event none warrants relief under Rule 52 (b) of the Federal Rules of Criminal Procedure.

a. Petitioner's contention that the trial judge erroneously instructed the jury that his reconstruction of engineering costs constituted, in itself, the making of a false claim (Pet. 21) has already been dealt with and shown to be without merit. See *supra*, pp. 9–10.

b. Similarly unfounded is petitioner's claim (Pet. 21–22) of prejudicial error in that the trial judge refused to charge as requested that a "wrongful purpose is an essential element of the offense." Although the trial judge may not have charged in the specific language requested, he made clear that a wrongful

[5] The regulations provide (32 C. F. R. 8. 503–1 (b)) that, with the consent of the contracting officer, "proposals may be filed in successive steps covering separate portions of a claim. If such interim proposals are submitted, they should include all costs of a particular type, except as the Contracting Officer may authorize otherwise."

purpose was an essential element of the offense. He charged (R. 323):

> I have defined "wilful" to you as used in a criminal statute. It means an act done with a bad purpose, an evil motive, an evil mind. An innocent mind, a mind clear and fresh, without any ulterior motive, would not devise a scheme; it must come from an evil mind; it must be motivated by a bad purpose, and that is a rather complex psychological factor that you will have to evaluate.

(See also R. 319, 320–321, 322.)

c. Petitioner further argues that he was prejudiced by remarks made by the United States Attorney to the jury in rebuttal, relating to the part played in these transactions by the Pinsleys, the owners of Espey Corporation. The rebuttal of the United States Attorney is the only portion of the closing statements of either counsel which was transcribed and hence the only portion made part of the record. Although the statement is thus shorn from context, it is evident that the United States Attorney was answering statements made by defense counsel, and was thus entitled to wide leeway in response. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 241, 242; *Brennan* v. *United States*, 240 F. 2d 253, 264 (C. A. 8), certiorari denied, 353 U. S. 931; *United States* v. *Doyle*, 234 F. 2d 788, 796 (C. A. 7), certiorari denied, 352 U. S. 893; cf. *Lawn* v. *United States*, 355 U. S. 339, 359–360, n. 15.

In any event, by specifically charging the jury to disregard these remarks of the United States Attor-

ney relating to the Pinsleys, the trial judge protected petitioner from any possible prejudice. *Az Din* v. *United States*, 232 F. 2d 283, 285 (C. A. 9), certiorari denied, 352 U. S. 827; *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 637 (C. A. 2), certiorari denied, 329 U. S. 742.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari should be denied.

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GEORGE MASTROS,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner's Reply Memorandum.

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PETITIONER'S REPLY MEMORANDUM

The Government's Brief in Opposition calls for a few words in reply. It states (Br. Op. 10-11), (footnote omitted):

> "Petitioner also argues that the evidence was insufficient to establish a false claim because there was evidence that the ultimate proposal, filed after that here involved, was for a higher total amount, even though the claim as to the engineering labor costs was reduced by approximately $77,000. The fact remains, however, that the claim presented did not contain a claim for reimbursement of an excessive amount for labor costs. As of the date it was presented, for what it purported to cover,

the claim was false. The fact that a subsequent proposal may have been higher because of the legitimate increase in other items does not affect the falsity of the claim that was presented at the time it was presented."

Inasmuch as GX9, the fourth settlement proposal —the original of which has been filed with the Clerk of this Court—shows that Espey had asked some $200,000 more from the Government, *after the engineering costs were eliminated*, than the amount in the settlement proposals (GX6, GX7, and GX8) prepared by petitioner and in respect of which he was convicted, it is plain that petitioner was not a party to any document that laid claim to a sum greater than that to which Espey was entitled. To the contrary, petitioner signed documents that sought *less* than the total amount of money "due and owing" and paid to that company by the United States. Consequently, it is plain that, having regard to the allegation of the indictment (2a) that petitioner had prepared a settlement proposal which "was false since said defendant knew well that the total amount due and owing to the Espey Manufacturing Company, Inc., on said settlement claim was substantially less than the amount claimed," the Government *now* necessarily concedes that he did not make a false claim *as charged*. All that the Government now asserts is that he made a false statement in violation of 18 U. S. C. § 1001 (Pet. 3). Yet the count laid under that section, which denounces the making of false statements was dismissed (1a, 312a, 313a).

Thus the record plainly establishes petitioner's innocence under the count on which he was convicted, laid under 18 U. S. C. § 287 (Pet. 2), and on which alone the sentence rests. There is accordingly no need at this juncture for petitioner to reargue his contentions (Pet. 17-20) that the Government has utterly failed to

establish any falsity in fact in the statements themselves.

Accordingly it is respectfully submitted that the present petition for certiorari should be granted.

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September 1958.